

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF COLORADO

3 Criminal Action No. 05-cr-00545-EWN

4 UNITED STATES OF AMERICA,

5 Plaintiff,

6 vs.

7 JOSEPH P. NACCHIO,

8 Defendant.

9 REPORTER'S TRANSCRIPT
10 TRIAL TO JURY
11 VOLUME TWENTY

12 Proceedings before the HONORABLE EDWARD W. NOTTINGHAM,
13 Judge, United States District Court for the District of
14 Colorado, commencing at 8:34 a.m., on the 5th day of April,
15 2007, in Courtroom A1001, United States Courthouse, Denver,
16 Colorado.

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23 THERESE LINDBLOM, Official Reporter
24 901 19th Street, Denver, Colorado 80294
25 Proceedings Reported by Mechanical Stenography
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15 P R O C E E D I N G S

16 *THE COURT:* Good morning. I understand this is
17 earlier than I announced we would start. It occurred to me as
18 soon as counsel was here, we ought to proceed in order to avoid
19 any possible delay in the start of the continuation of the jury
20 trial at 9 o'clock.

21 There are a number of pending motions.

22 The first motion before the Court is Document No. 306,
23 the motion to strike the testimony of Sally Anderson, for a
24 mistrial in the alternative, and to exclude further investor
25 testimony.

1 Insofar as the motion asks to exclude further investor
2 testimony, the motion is moot, because no further investor
3 testimony has been offered by the Government. So the Court
4 needs to decide the motion to strike and the motion for a
5 mistrial.

6 In the Court's view, the presentation of
7 Ms. Anderson's testimony occurred primarily because of a
8 misunderstanding or miscommunication between Government counsel
9 and the Court. And I'm not faulting Government counsel. It
10 was just not very clear what was being offered and what was --
11 what the scope of the Court's ruling was.

12 The Court asked Government counsel, is this a person
13 who purchased U S WEST stock during the time when Mr. Nacchio
14 was selling? Mr. Traskos said she made an election to
15 contribute to Qwest shares plans, and she made the election in
16 response to a statement by Mr. Nacchio.

17 The Court assumed this meant she did all of this
18 during a time when Mr. Nacchio was selling. That turned out
19 not to be the case.

20 The testimony of Ms. Anderson was that at the time
21 when this original public guidance which has been extensively
22 discussed was issued, namely, September 7, 2000, Mr. Nacchio
23 simultaneously sent an e-mail to all Qwest employees. And
24 consistent with that public guidance, the e-mail was, to use
25 the term that we heard used here, bullish.

1 There is no evidence before the Court that Mr. Nacchio
2 at that time had any material inside information that adversely
3 reflected on the price of the stock.

4 And therefore, this was -- this transaction did not
5 occur at a time when he did have material public information,
6 and it did not occur at a time when the Indictment alleges that
7 he had material inside non-public information.

8 Ms. Anderson's testimony was that in response to
9 Mr. Nacchio's statement, she almost immediately went out and
10 put all of her retirement shares, 100 percent, in Qwest stock,
11 as opposed to 50 percent in Qwest stock, which she had invested
12 before Mr. Nacchio made that statement.

13 It is not clear that she maintained that election and
14 continued to purchase shares into 2001, although I think the
15 inference might be drawn that she never changed that election.

16 In any event, the Government offers or offered
17 Ms. Anderson's testimony on two bases.

18 First, it argued that it went to the standard of what
19 a reasonable investor would do. And it also, according to the
20 Government, went to the question of whether there was
21 disclosure to people in Ms. Anderson's position.

22 I want to step back a minute and talk about the
23 reasonable investor standard. That goes to the question of
24 whether this testimony by people who invested in Qwest is
25 admissible on the question of materiality in the first place.

1 The Court is mindful of the Supreme Court cases
2 articulating the definition of materiality. *Basic Inc. v.*
3 *Levinson* said that materiality depends on the significance the
4 reasonable investor would place on the withheld or
5 misrepresented information.

6 In other words, in order to be material, there must be
7 a substantial likelihood that the disclosure of the omitted
8 fact would have been viewed by the reasonable investor as
9 having altered the total mix of information made available.
10 The basic test for materiality is whether a reasonable man
11 would attach importance in determining his choice of action in
12 the transaction in question.

13 And I mention that not only because this goes to the
14 prosecution's evidence from these investors, but it also goes
15 to evidence that the defendant evidently is going to offer in
16 the form of its expert witness.

17 In the Court's view, all of this kind of testimony is
18 superfluous. The Court would analogize this to a case -- a
19 simple negligence case, where a jury is asked to determine
20 whether the -- a person who is allegedly negligent took an
21 action a reasonable man would take or failed to take an action
22 a reasonable man would not take in order to avoid harm to
23 himself or others.

24 In that type of case, you don't put the facts of the
25 act or incident in question to a hypothetical reasonable man

1 and say, what would you have done under these circumstances?
2 You present the facts, and you allow the jury to act as the
3 hypothetical reasonable man, interpreting those facts.

4 And that's the Court's view of what should happen in
5 this case.

6 The facts are out, at least part of the facts are out
7 at this point.

8 The question is whether in light of all that was
9 disclosed and all that wasn't disclosed and in light of all the
10 other circumstances a reasonable man or a reasonable person
11 would regard the non-disclosure as material. And that is
12 something that the jury can decide on its own without the
13 necessity of having investors come in and give the jury their
14 opinion on what is material and without having an expert come
15 in and give the jury his opinion on what is material.

16 So for those reasons, if the Court had completely
17 communicated with the Government as to Ms. Anderson's
18 testimony, the Court would not have allowed her testimony in
19 the first place, because the Court regards it as of no
20 relevance to the question of materiality and what a reasonable
21 investor would have done in these circumstances.

22 The Government alternatively argues that this could be
23 admissible on the issue of what was disclosed and what wasn't
24 disclosed.

25 So viewed, and so offered, this would be cumulative

1 testimony.

2 There is an abundance of testimony from the
3 January 2001 time period through summer of 2001 as to what was
4 disclosed and what was not disclosed.

5 The Court, therefore, as I say, would have excluded
6 Ms. Anderson's testimony.

7 Consistent with that, the Court will strike
8 Ms. Anderson's testimony. The Court will remind the jury
9 basically what the testimony was and will instruct the jury to
10 disregard it.

11 In those circumstances -- and I think that I could go
12 either way on this. I could leave the testimony in and turn to
13 the motion for a mistrial or I could strike the testimony. And
14 as I understand the motion for a mistrial, it's in the
15 alternative.

16 Even if the jury didn't regard this testimony, it is
17 in the context of this overall trial not grounds for a motion
18 for a mistrial.

19 The Court would remind counsel that the testimony
20 spanned a period of time of 26 minutes. There were 15 minutes
21 spent on direct and 11 minutes spent on cross, according to the
22 Court's records. The testimony, even if it were admitted, can
23 be properly evaluated by the jury and can be the -- and could
24 be the proper subject of argument as to the weight that should
25 be given to testimony that pertained to September 2 --

1 September 7, 2000, the time heard that was before the
2 Indictment in this case.

3 The Court, therefore, sees no basis for a mistrial in
4 any case. And in an abundance of caution, it will strike
5 Ms. Anderson's testimony. So the motion for mistrial is
6 denied. The motion to strike Ms. Anderson's testimony is
7 granted.

8 *MR. STERN:* Excuse me, Your Honor.

9 I'm not arguing anything. I just want to address
10 briefly your suggestion of what to tell the jury. And I would
11 ask you to do nothing until I've had a chance to confer with my
12 colleagues.

13 *THE COURT:* All right.

14 You certainly want me to tell them that the testimony
15 is stricken?

16 *MR. STERN:* I did not know what you would rule. I
17 want to speak to my colleagues. I know the testimony is
18 stricken, that has the effect, if I understand the law, that
19 the Government cannot argue from it. I have to evaluate from
20 my colleagues, having heard from Your Honor, whether we wish
21 for you to say anything to the jurors, because there is a risk
22 of emphasizing it. And particularly since some of the things
23 you indicated you might say as reasons, I don't know that we
24 necessarily would like the jury to hear.

25 I don't think it's necessary for you to make this

1 determination immediately, and I only ask --

2 *THE COURT:* All right. That's fine.

3 I don't know what I just ruled, then, in light of
4 that. I think I struck the testimony, and --

5 *MR. STERN:* Yes, you struck the testimony.

6 *THE COURT:* And the jury needs to be told that I
7 struck the testimony at the very least.

8 I will not say anything to the jury until after
9 counsel have both had input.

10 *MR. STERN:* Thank you.

11 *THE COURT:* The next motion before the Court is a
12 motion to strike the testimony of David Weinstein related to
13 Government Exhibits 225, 226, 227 and to strike those exhibits
14 from evidence, or in the alternative for a mistrial.

15 This, of course, relates to the testimony that was
16 elicited by the Government concerning the assets, financial
17 holdings, and ultimately, the net worth of Mr. Nacchio.

18 The Court regards this as a straightforward Rule 404
19 and -- excuse me, 401 and 403 problem.

20 This is not testimony of other crimes which is
21 particularly sensitive. It is testimony that if relevant and
22 offered for a proper purpose must be evaluated under Rule 403.

23 The Government clearly articulated at least three
24 proper purposes for offering this testimony, and that was to
25 address the issue of whether Mr. Nacchio was exercising these

1 options because he needed to further diversify his holdings,
2 whether he needed to exercise the options in this manner
3 because they were expiring, and whether he was exercising these
4 options in the manner he did for tax purposes. All of those
5 are proper purposes in the case, given the defendant's opening
6 statement and given the evidence that the defendant has
7 elicited on cross-examination in this case.

8 The testimony was, therefore, relevant, highly
9 relevant information.

10 Turning to the question of whether it should have been
11 excluded under Rule 403, the Court found at the time and sees
12 no reason to change the finding now, that the probative value
13 of this material and these exhibits and this testimony on the
14 issues articulated by the Government substantially outweighs
15 any danger that there might be prejudice in the minds of the
16 jurors or that the jurors might be confused. There was nothing
17 confusing about the testimony.

18 The dangers, as I understand it, as articulated by the
19 defense, is that this shows considerable wealth on the part of
20 Mr. Nacchio, and the jury may somehow be prejudiced by that.
21 That prejudice is almost ephemeral in this case, in the Court's
22 view.

23 The Court during the time the testimony was being
24 elicited in response to objections by the defense attorney told
25 the jurors explicitly that they were not to convict Mr. Nacchio

1 merely because he was a wealthy man. I do not anticipate any
2 argument from that -- to that effect by the Government in
3 closing argument, because Government counsel already disavowed
4 any intent to make such an argument when the testimony was
5 offered.

6 The Court, therefore, under Rule 403 sees no basis for
7 excluding this testimony. The testimony -- the motion to
8 strike is denied. The motion for a mistrial is denied.

9 If the testimony was proper or offered for a proper
10 purpose, and it was, and if the proper purpose or the probative
11 value of the evidence outweighed its prejudicial effect, there
12 is no basis for excluding it and no basis for a mistrial.

13 The next motion is a motion to redact Government
14 Exhibit 215 and to strike the testimony relating thereto.

15 This seems to the Court to be a tempest in a teapot.

16 The question raised is whether the following sentence
17 at the end of one of Mr. Weinstein's numerous memoranda to the
18 file should result in a mistrial. The sentence was, "Can you
19 believe it?"

20 And it was unclear whether that was something
21 Mr. Nacchio said or whether it was something that the witness,
22 Mr. Weinstein, put in the exhibit as sort of a gratuitous
23 comment. The Court, consistent with what defense counsel
24 requested, treated it as sort of a gratuitous, volunteered
25 expostulation by Mr. Weinstein and, therefore, sustained any

1 objection beyond the reading of the testimony.

2 So consistent with the ruling that I made, to the
3 extent that I didn't already order redaction, that sentence
4 will be redacted from Exhibit 215 before it is submitted to the
5 jury.

6 I thought I already did that, but I didn't go back and
7 check. And if I didn't do it, that -- it will be done now
8 before the exhibit is given to the jury.

9 As to the motion to strike the testimony, here is what
10 happened:

11 Without objection, Mr. Weinstein read the entire
12 exhibit into evidence, including this particular sentence.
13 Thereafter, the Government attempted to elicit some further
14 testimony regarding this sentence. There were arguably some
15 insinuations or suggestive questions by Government counsel.
16 The Court sustained every single objection that was actually
17 made to this testimony. The jury will be instructed that
18 insinuations and suggestive questions by counsel are not
19 evidence in the case.

20 And the Court would further point out, consistent with
21 what defense counsel just rose and stated, that striking this
22 testimony would focus this jury's attention on the very
23 testimony that you don't want stricken, because I couldn't do
24 it any other way than by saying, ladies and gentlemen of the
25 jury, disregard the sentence at the end of this memorandum,

1 "can you believe it?"

2 I don't think that striking the testimony is the
3 proper remedy, because it would focus the jury's attention on
4 the very testimony to be stricken.

5 So the motion to strike the testimony is denied. The
6 motion to redact the document is granted. The motion for a
7 mistrial based on the testimony is denied. This is a blimp --
8 a blip, I should say, on this entire trial radar screen. The
9 exhibit will not contain the sentence that's allegedly
10 offending here.

11 There is -- of course, it was a -- all the testimony
12 was stricken, anyway, except for the reading of the exhibit by
13 the witness, as to which there was no objection.

14 The Court sees no possibility whatsoever that failure
15 to strike the testimony would result in any kind of prejudice
16 at all to the defendant.

17 *MR. STERN:* Your Honor, may I have a point of
18 clarification?

19 I just want to be clear that you're not striking the
20 testimony because you think that that would emphasize it,
21 relating to something I said on a different point, and I'm not
22 arguing with the Court, because I know you don't like that.
23 However, I want to be clear that counsel, then, cannot use that
24 sentence in argument to the jury.

25 *THE COURT:* Of course not. That's just ridiculous

1 that you should even stand up and interrupt this with that kind
2 of an argument.

3 *MR. STERN:* Your Honor --

4 *THE COURT:* Mr. Stricklin, did you ever intend to use
5 testimony that I excluded?

6 *MR. STRICKLIN:* No, Your Honor.

7 *MR. STERN:* You specifically ruled that you were not
8 excluding the testimony, and I wanted to be clear.

9 *THE COURT:* He can't refer to the testimony and to a
10 redacted testimony. I'm excluding the testimony only because
11 to mention it at all would emphasize it.

12 *MR. STERN:* I just wanted to be clear, Your Honor.

13 *THE COURT:* If counsel made that kind of an argument,
14 obviously, I would sustain an objection.

15 The next matter before the Court is the motion to
16 strike the testimony of David Weinstein related to character
17 evidence or, in the alternative, for a mistrial.

18 This entire question is governed by Rules 404 and 405
19 of the federal Rules of Evidence. Rule 404 states the general
20 rule of evidence that's prevailed for centuries in courts in
21 this country. Evidence of a person's character or trait of
22 character is not admissible for proving action in conformity
23 therewith on a particular occasion.

24 That reflects a judgment that was made long before
25 these specific rules were enacted that we do not try persons

1 based on their bad -- general bad character; that is to say,
2 the State, or the Government, has to prove that the defendant
3 committed a specific criminal violation and cannot prove that
4 violation by proving generally that he has a bad character
5 trait.

6 And in this case, just so we're clear, the relevant
7 character trait is the trait for telling the truth or for
8 honesty.

9 There are exceptions to that rule. In a criminal
10 case, evidence of a pertinent trait of character offered by an
11 accused can be received in evidence. The law recognizes that
12 evidence of good character offered by an accused party can be
13 the basis of a reasonable doubt and an acquittal on the ground
14 that persons of good character, or having the good character
15 trait in question, would not act inconsistent with that good
16 character trait in a particular transaction.

17 And it's important to recognize for general background
18 of evaluating this defense motion that when evidence of an
19 accused's character for truthfulness or honesty is offered,
20 there are really two characters that are at issue.

21 The first, obviously, is the character of the
22 defendant as to which a character witness is testifying. The
23 second person whose character is in issue is the character of
24 the witness.

25 In order for character testimony to be effective, the

1 jury has to believe not only that the defendant is of a
2 character that would preclude him from acting untruthfully or
3 dishonestly, it must also believe that the character witness
4 knows the accused so intimately and so well and has known the
5 accused for so long that the witness, in effect, is inside the
6 accused's mind and knows and understands his true character for
7 truthfulness or honesty.

8 And that's why it's common that persons -- or
9 religious advisers are commonly called on issues of character,
10 because, of course, a religious advisor is someone that a jury
11 could reasonably conclude knows the defendant inside and out,
12 so to speak, and can speak to the defendant's proclivity to
13 tell the truth or the defendant's proclivity for honesty.

14 And the jury also has to believe the character witness
15 himself.

16 So with that background, I turn to the methods of
17 proving character.

18 Rule 405 provides that character evidence can be
19 offered in the form of reputation, which is not the question
20 here, and it can be offered in the form of an opinion by the
21 character witness.

22 So the primary issue that's presented by this motion
23 and by the entire course of testimony in question is whether
24 the defendant, in effect, put his character in issue in a
25 limited way.

1 Now, in my ruling, I'm not saying that the prosecution
2 may now offer evidence of bad reputation or offer character
3 evidence beyond the single question that I have already allowed
4 them to offer. However, the Court finds that the defendant did
5 put his character in issue.

6 Contrary to what the defendant says, this was not an
7 isolated question in which the witness was asked whether with
8 respect to a particular statement the witness believed what the
9 accused was telling him. This is not a question where the -- a
10 case where the defendant simply elicited testimony suggesting
11 that it was important for Mr. Nacchio, the accused, to make
12 full disclosure in order to get accurate information or
13 accurate advice concerning financial transactions on which
14 Mr. Weinstein was furnishing him advice.

15 The difficult part of this issue is that this is not a
16 case where, as in most cases, the defendant in presenting his
17 case opens the front door and presents character evidence.
18 This is an instance where in the Court's view there was an
19 attempt to open the back door and present character evidence
20 and then slam the back door as soon as that was in. That
21 was -- it was set up that way from the very beginning.

22 Mr. Weinstein was not only portrayed as a business
23 advisor to, he was portrayed as a man who had known the
24 defendant in business for many years. He was portrayed as a
25 man who for many years had been intimate with the defendant in

1 all of his important financial transactions, including the
2 transaction -- the financial transactions that are central to a
3 person's life, estate planning, financial planning,
4 diversification, plans for helping the defendant in his estate
5 planning.

6 And Mr. Weinstein was portrayed not only as an
7 intimate business and financial advisor, he was portrayed as a
8 person who was on intimate personal terms with the defendant.
9 He was portrayed as somebody who had visited the defendant's
10 house on many occasions. He was portrayed as somebody who had
11 been present on many significant occasions and a person who had
12 enjoyed the defendant's visits on some significant occasions.

13 They had attended -- I would call Mr. Weinstein -- I
14 recall -- I recall Mr. Weinstein saying that the defendant
15 attended his son's Bar Mitzvah, that they had socialized
16 together for many years.

17 This was set up from the very beginning as somebody
18 who had -- who was intimate enough with Mr. Nacchio that he
19 knew Mr. Nacchio's character for truthfulness or honesty. And
20 this was not just portrayed as a single question.

21 Counsel asked the following question:

22 As you and he monitored his financial affairs
23 throughout the year 2000 and 2001, he continued to follow your
24 advice of selling and executing a portion of his options?

25 Correct.

1 Not as much as you advised him.

2 I believe so, yes.

3 Not as much as you wanted him to do.

4 Right.

5 And he told you constantly, didn't he, that he
6 expected great things of the company, true? He told you he
7 didn't want to sell the shares because he believed in the
8 future of the company, isn't that a fact?

9 And even when the shares were falling, the shares of
10 the company were falling under criticism from Wall Street, you
11 had a conversation about that with him, didn't you, and maybe
12 you asked him or maybe you volunteered the subject of why these
13 shares were getting, can I use the vernacular, hit during that
14 period of time? And that was in August, roughly, you had that
15 conversation. Do you remember what he told you?

16 Let me help you. You remember he told you that the
17 whole telecom industry was getting hammered. Did he tell you
18 that his company was getting hammered the ways the others were?
19 Did he tell you he believed the company would recover? Did he
20 tell you the industry would recover?

21 Yes.

22 And then continuing in what had already been set up in
23 the questioning before, you knew the man very well, didn't you?
24 You knew his wife, you knew his children, you were in his home,
25 he was in your home?

1 The witness said, he was never in my home, but, yes, I
2 was in his home, numerous occasions, yes.

3 Do you feel you know the man?

4 I believe so, yes.

5 Did you believe he was telling you the truth?

6 Yes.

7 Now, that question related not just to the prior
8 question and not just to a limited form of testimony, this was
9 a question as to whether Mr. Nacchio was telling Mr. Weinstein
10 the truth during this entire set of transactions during
11 2000 and 2001 when they were monitoring and continually
12 discussing Mr. Nacchio's financial situation.

13 The Court finds that that series of questions and that
14 attempt to portray Mr. Weinstein's relationship with
15 Mr. Nacchio was effectively putting Mr. Nacchio's character for
16 truthfulness or untruthfulness in issue.

17 Nonetheless, the Court did not allow the prosecution
18 to get very far into this. The Court notes that in the heat of
19 battle Rule 608 was cited incorrectly as being the basis for
20 the prosecution's offer. 608, as the defense points out, has
21 to do with the character of witnesses.

22 But Rules 404 and 405 are the appropriate basis for
23 the prosecution's offer.

24 Rule 404(a) states that when the accused offers a
25 character trait the prosecution may offer evidence to rebut the

1 same, and Rule 405(b) says that in cases in which character or
2 trait of character -- excuse me, Rule 405(a) says on
3 cross-examination, inquiry is allowable into relevant, specific
4 instances of conduct.

5 So in the Court's view, the prosecution, in
6 retrospect, might have been permitted to get into the entire
7 specific transaction in question. The transaction in question,
8 which the prosecution alluded to obliquely because of the
9 Court's limitations, was that Mr. Nacchio had requested
10 Mr. Weinstein to misdate a document in order to obtain Qwest's
11 payment on a document rather than have Mr. Nacchio pay it
12 himself. The Court did not allow the prosecution to explore
13 all of that. The Court's permission was much more limited.

14 The prosecution was only allowed to ask whether
15 Mr. Weinstein knew of an instance where Mr. Nacchio committed
16 an act of dishonesty. At that point, of course, the defendant
17 was perfectly free to bring out the entire transaction if it
18 thought that was beneficial.

19 In terms that I discussed earlier about whose
20 credibility is in issue, this single question was in the
21 Court's view entirely appropriate.

22 What was at issue here is not only whether Mr. Nacchio
23 has a -- at least in Mr. Weinstein's opinion, was a truthful or
24 untruthful person on a series of occasions, what the jury needs
25 to decide is whether Mr. Weinstein had a sufficient basis to

1 make that evaluation. And in making that evaluation, the jury
2 is entitled to know that there was one occasion during this
3 entire period of time when Mr. Weinstein knew or thought that
4 Mr. Nacchio was acting dishonestly.

5 This single question goes to the -- not to
6 Mr. Nacchio's character so much for truthfulness or
7 untruthfulness, it goes primarily and centrally to whether
8 Mr. Weinstein had a basis for his formation -- his opinion
9 concerning Mr. Nacchio's character. And it is important for
10 the jury to know that -- in evaluating what Mr. Weinstein was
11 saying, that there was at least one occasion during this
12 specific period of time when Mr. Weinstein thought Mr. Nacchio
13 was not telling the truth.

14 For that reason -- for those reasons, I should say, in
15 the Court's view the testimony of Mr. Weinstein need not be
16 stricken. It was entirely appropriate. The door was opened on
17 cross-examination. The testimony that was allowed was much
18 more limited than testimony which in the Court's view in
19 retrospect could have been allowed on redirect examination.

20 Because the Court believes the testimony was
21 appropriate, the Court would deny the motion for a mistrial.
22 The Court would note that if the testimony was inappropriate
23 somehow the Court would still deny the motion for a mistrial.
24 This was one single comment by a witness on an issue which had
25 been raised by the defendant, and in the context of the overall

1 case, the Court is unable to find that the single comment
2 prejudiced the defendant in any way.

3 And the final and most important evidentiary issue in
4 the Court's view is the matter concerning Exhibit A-1031.

5 We've had extensive discussion about this, and I was
6 so troubled by the question that I entertained extensive
7 argument on the matter yesterday.

8 Exhibit 1031 was offered by the defendant during the
9 course of Mr. Weinstein's testimony on cross-examination of
10 Mr. Weinstein. And the Government objected on the grounds that
11 it contained hearsay within hearsay, and the Court sustained
12 the objection.

13 As I said yesterday, although the Government may stand
14 on the lack of contemporaneous arguments in pursuing its case,
15 the Court has fully considered the arguments that have been
16 made by the defendant in the motion for a mistrial and the
17 motion to admit the evidence.

18 To be clear, and perhaps to be somewhat repetitive,
19 the problematic language, as I understand it, is the following:

20 Mr. Weinstein reports, and in his memorandum to the
21 file, that on December 7, five days before he wrote the
22 memorandum, or at least five days before the memorandum was
23 dated, he, Mr. Weinstein, asked Yash Rana, who was acting as
24 counsel for Qwest assisting Mr. Nacchio in selling the growth
25 shares, if there was a problem from an insider trading

1 perspective. And Yash told me there was not. The Government
2 argues that that is hearsay.

3 The memorandum continues on, Joe previously made an
4 irrevocable election to sell the shares during the last window
5 period, and according to their legal counsel, this qualifies
6 for an exemption for the insider trading rules.

7 And the Government argues that that is hearsay within
8 hearsay within hearsay, evidently because the Government
9 assumes that Mr. Nacchio told Mr. Rana that he had previously
10 made the irrevocable election.

11 On further reflection, that's not necessarily hearsay
12 within hearsay, because there is a possibility that Mr. Rana
13 was told by Mr. Nacchio or participated in the transaction to
14 make an irrevocable election, and if Mr. Nacchio -- if it was a
15 transaction in which Mr. Rana participated, that may not be
16 hearsay.

17 In any event, the Court ruled that this is not a
18 business record. And upon further review of the business
19 record exception, the Court persists in the ruling that it's
20 not a business record.

21 The Court is aware of no other rule of evidence which
22 allow admission of this, except for the residual hearsay
23 exception, Rule 807.

24 And alternatively, the Court believes in these
25 circumstances that the defendant's right to due process

1 justifies admission of this evidence with certain caveats.

2 Rule 807 provides, statement not specifically covered
3 by Rule 803 or 804 but having equivalent circumstantial
4 guarantees of trustworthiness is not excluded by the hearsay
5 rule if the Court makes certain determinations.

6 The first determination is that the statement is
7 offered as evidence of material fact. There is no question
8 that it is offered as evidence of a material fact, namely, when
9 Mr. Nacchio made an irrevocable election to sell the growth
10 shares.

11 B, the Court must find the statement is more probative
12 on the point for which it is offered than any other evidence
13 which the proponent can procure through reasonable efforts.

14 It is true, as Mr. Stricklin pointed out, that one
15 other person to this transaction is Mr. Nacchio, and that
16 Mr. Nacchio's testimony might be offered. However, the Court
17 believes that ruling on this basis and saying that
18 Mr. Nacchio's testimony can be offered would be an interference
19 with his Fifth Amendment right not to testify in this
20 proceeding. And therefore, the Court finds that the statement
21 in question is more probative on this point for which it is
22 offered than any other evidence which the proponent can
23 procure.

24 The Court must also find that the general purposes of
25 these rules and the interest of justice will best be served by

1 admission of the statement into evidence, and I'll address that
2 in connection -- in a moment in connection with circumstantial
3 guarantees of trustworthiness and the due process argument.

4 But before I do that, I want to note that there is a
5 concluding sentence saying that the proponent must make known
6 to the adverse party sufficiently in advance of the trial or
7 hearing to provide the adverse party with a fair opportunity to
8 prepare or meet it.

9 As the Government points out, there was nothing -- no
10 notice provided prior to the trial of this case. And so the
11 question is whether the Court should rule that because that
12 notice was not provided the statement cannot be offered.

13 The Court has attempted to locate authority on this
14 issue, and the only thing the Court has been able to come up
15 with is a Tenth Circuit unpublished decision reported at 2005
16 U.S. appellate LEXIS 12926. That's a 19 -- a 2005 decision
17 called *SEC v. 4N Exchange*.

18 In this case the Court adopted -- the unpublished
19 decision adopts what the Court understands to be a majority
20 view. It is clear that the purpose of the notice requirement
21 was satisfied because of the ample opportunity that the
22 receiver enjoyed to prepare to meet the evidence.

23 The Court will grant the Government whatever time it
24 needs to meet the evidence. Of course, I recognize that it's
25 going to be difficult, I assume it's going to be difficult,

1 because as we discussed yesterday, Mr. Yash Rana is unavailable
2 and may assert his Fifth Amendment privilege. If there is
3 other evidence that the Court is not aware of, the Government
4 will be given an opportunity to obtain that evidence.

5 With that, even though this was not -- notice was not
6 provided pretrial, the Court, relying on this case and on what
7 it understands is the majority rule, rules that there has been
8 substantial and adequate compliance with the notice requirement
9 and, therefore, will turn to the question of whether there are
10 circumstantial guarantees of trustworthiness in this statement
11 and whether the general purposes of these rules and the
12 interest of justice will be best served by the admission of the
13 statement into evidence.

14 In this instance, the Court finds that there are
15 circumstantial guarantees of trustworthiness in this statement.

16 Now, that's not to say I'm finding that the statement
17 is trustworthy, the -- and the Government is at liberty to
18 argue to the contrary.

19 Here is the circumstantial guarantee of
20 trustworthiness that I find in this case:

21 On -- on or about January 2, 2001, in what is called a
22 Rule 144 -- Form 144 filed with the Securities and Exchange
23 Commission to authorize the sale of this stock, Mr. Rana, the
24 same declarant, made certain statements.

25 The Court notes that on the form itself, in bold type

1 and outlined in a box, are the words "attention. Intentional
2 misstatements or omission of facts constitute federal criminal
3 violations, see 18 U.S.C. 1001, close paren."

4 That, of course, refers to the general federal false
5 statements statute, which makes it a crime for anybody to make
6 false statements on matters within the jurisdiction of an
7 agency of the United States.

8 So under pains and penalties of criminal prosecution,
9 Mr. Rana, who was and is an attorney at law, made the following
10 representations:

11 The securities to which this notice relates were
12 issued to Mr. Nacchio pursuant to the Qwest Communications
13 International growth share plan and the related growth share
14 agreement in Mr. Nacchio's employment.

15 On November 3, 2000, Mr. Nacchio provided irrevocable
16 instructions for the sale of such securities in accordance with
17 Rule 10b5-1 promulgated under the Securities Exchange Act of
18 1934 as amended.

19 And the final paragraph contains a further
20 representation that as of November 3, 2000, the date on which
21 he provided irrevocable instructions, he did not have material
22 adverse information.

23 I recognize that the Government may think that that in
24 itself is fraudulent, and it may be. It may be that Mr. Rana
25 was involved in this transaction as an aider or abettor or a

1 participant. But the case law suggests that circumstantial
2 guarantees of trustworthiness and indicia of reliability may be
3 found where the same statement is corroborated under oath or
4 under pains of a criminal prosecution.

5 In other words, Mr. Rana, a licensed attorney, by
6 signing this statement, subjected himself to criminal
7 prosecution. And that is a circumstantial guarantee of
8 trustworthiness sufficient in this Court's view to allow
9 admission of Defense Exhibit A-1031.

10 And I'll say one final thing on the question of due
11 process or the general purpose of these rules.

12 This is a close question. And in deciding the
13 question, the Court is mindful of the Government's argument
14 that the hearsay rules exist for a purpose and the Government's
15 argument that it is precluded from cross-examining Mr. Rana
16 concerning this transaction.

17 It is true that the hearsay rules exist for a purpose.
18 But the hearsay rules also provide that the Court can find
19 circumstantial guarantees of trustworthiness. The Court has so
20 found here.

21 As I've indicated earlier, I also think that there are
22 due process implications in excluding this material. This
23 really is, as I think both parties recognize, an important item
24 of evidence. According to the cases on due process -- and I'm
25 talking about *Chambers V. Mississippi*, among others -- where a

1 statement involved in the case is offered at trial under
2 circumstances that provide assurances of reliability, due
3 process may require that the statements be received.

4 It's important that the -- this Court and the federal
5 government generally afford the defendant a fair trial. And a
6 fair trial requires that this be in front of the jury for
7 whatever weight it is worth.

8 Now, as I said yesterday, I will tell the jury when
9 this exhibit is received -- and I will need to receive it --
10 that Mr. Rana, the declarant, is not available for testimony
11 and, therefore, could not be called by the Government and could
12 not be called by the defendant. That is all I will tell the
13 jury. I will not tell the jury why in part because we're not
14 100 percent sure why. I'm relying on statements that both
15 attorneys have made.

16 And even if there is any inference to be drawn by his
17 invocation of the Fifth Amendment privilege, it's not clear
18 that this transaction is the basis for that invocation of the
19 privilege.

20 And in any event, if I told the jury that, I'm afraid
21 the jury would assume that if Mr. Rana invoked his privilege
22 with respect to this transaction it would be very damaging to
23 the defendant in this transaction, because the jury might
24 assume that the defendant and Mr. Rana were acting jointly in
25 this transaction. And Mr. Rana's invocation of the privilege

1 would be something that would be held against the defendant.

2 So Exhibit 1031 will be admitted in front of the jury
3 with the explanation that I just gave.

4 The Government is free to argue that it's all a big
5 lie.

6 *MR. STRICKLIN:* Your Honor, on the issue of notice and
7 timing, I put some thought to this last night, kind of
8 anticipating where the Court may end up.

9 And the way that I would propose handling this would
10 be, instead of just receiving this document and then
11 instructing the jury -- I think the instruction is a good one,
12 and it needs to be received. But I think the way to resolve
13 this is to require the defense recall Mr. Weinstein and ask him
14 about that document and offer it through Mr. Weinstein as --
15 he's the appropriate witness to ask him about.

16 We were both -- because the document -- we're
17 revisiting the issue about this document coming in through
18 Mr. Weinstein. I think the defense should be required as a
19 proponent of this exhibit to call Mr. Weinstein and allow me to
20 ask him questions on -- about the exhibit on cross-examination.

21 *THE COURT:* Well, the defense motion, interestingly
22 enough, is a motion for the mistrial on the basis of Exhibit
23 A-1039 or proper examination related thereto.

24 Mr. Richilano, what do you think about it?

25 *MR. RICHILANO:* Your Honor, first of all, on the

1 question of notice, the Government knew about this exhibit
2 because we pointed it out on -- in our brief on the entire
3 backdating issue prior to trial. And we argued from it
4 extensively to demonstrate to the Court that the backdating
5 evidence is really an inference upon inference --

6 *THE COURT:* He didn't offer Rule 807 notice,
7 Mr. Richilano. Don't try to tell me that. It was in your
8 trial brief, that's true. That's not Rule 807 notice that
9 you're going to offer that exhibit under Rule 807. I'm not
10 going to accept that argument.

11 *MR. RICHILANO:* Let me offer this. This was on
12 cross-examination.

13 *THE COURT:* I understand.

14 *MR. RICHILANO:* Secondly, Your Honor, with respect to
15 the Court's ruling, we accept the Court's ruling. We do not
16 think it's necessary for Mr. Weinstein to be recalled. The
17 evidence will be before the jury now, as we argued both sides,
18 so the Government can argue its version, we can argue the other
19 version, and there is nothing more to be added in terms of
20 testimony.

21 *THE COURT:* All right. I disagree. I think
22 Mr. Stricklin's suggestion is a good one.

23 The offer of this exhibit -- I mean, it will be
24 received, but it will be received in a proper context, where
25 Mr. Weinstein is on the stand, and there is not a truncated

1 examination.

2 You know, part of the problem here is there was
3 considerable confusion when we were doing this. There was an
4 attempt to refresh Mr. Weinstein's recollection, and that would
5 have been proper if he had said, I don't remember, but he
6 hadn't. So the Court sustained an objection to the question of
7 whether his recollection needed to be refreshed.

8 I think that the interest of justice requires further
9 exploration of this issue with Mr. Weinstein.

10 I've said that what I've finally come down to is that
11 this exhibit ought to be before the jury so that the jury can
12 look at it, listen to the arguments of both counsel, and make
13 the decision. And consistent with that is the Government's
14 suggestion that Mr. Weinstein come back here and there be a
15 full exploration of this exhibit by both sides.

16 So that's the ruling. It will be received, you can be
17 assured of that, but you need to put Mr. Weinstein on the stand
18 at some point during your presentation.

19 *MR. RICHILANO:* Your Honor, just -- again, for the
20 record, there is a difference between the Government putting
21 this witness on who cooperated with them fully and us putting
22 him on, who he won't talk to.

23 *THE COURT:* Well --

24 *MR. RICHILANO:* That's our disadvantage.

25 *THE COURT:* You want me to permit the Government to

1 reopen its case and recall him?

2 *MR. RICHILANO:* No, Your Honor.

3 *THE COURT:* Then what are you asking?

4 *MR. RICHILANO:* I'm putting on the record the
5 difficulty we have with this witness not cooperating with us.
6 With the Court --

7 *THE COURT:* I don't think that affects anything.

8 *MR. RICHILANO:* Would the Court enter an order
9 requiring him to talk to us before his testimony?

10 *THE COURT:* No, there is no basis for this Court to
11 order any witness to talk to either party. The fact that the
12 witness chooses to talk to one side and not to the other side
13 is something that you can use, and have used extensively, in
14 cross-examination of the witness to show bias. But there is no
15 basis for a Court order. If you've got a single case that
16 tells me I can do that, I'm happy to entertain it.

17 Get the jury -- I know I have the motion on the expert
18 testimony, but we're already a half hour overdue with the jury,
19 and I know you want a ruling, Mr. Stricklin, but -- who's going
20 to examine Mr. --

21 *MR. STRICKLIN:* We've got Mr. Traskos for that, Your
22 Honor.

23 *THE COURT:* Really? Mr. Wise has taken a shot at him
24 before.

25 *MR. STRICKLIN:* Two things. I beg the Court's

1 indulgence for maybe a five-minute break. We came here and --
2 there is one other -- just one other brief matter, and that is,
3 there are two witnesses that are going to be called,
4 Mr. Anschutz and the abbot.

5 And the concern --

6 *THE COURT:* The abbot or the Abba? I get the abbot
7 and Abba mixed up, you know, the singer.

8 *MR. STRICKLIN:* Your Honor, it's been raised in
9 opening argument about some of Mr. Nacchio's personal family
10 difficulties during the relevant --

11 *THE COURT:* Hold on just a second.

12 *MR. STRICKLIN:* During the relevant time period, and
13 it's a -- it's difficult and obviously a tragic family
14 circumstance. I would ask for the Court to preclude any
15 evidence of his son's attempted suicide before this jury. And
16 I ask that under Rule 403, Your Honor.

17 There is just simply -- aside from inflaming the
18 prejudices of the jury and inflaming sympathies and having them
19 consider something they shouldn't consider in this case, there
20 is just no basis for that evidence.

21 And I know that it would be a subject of inquiry for
22 Mr. Anschutz and be based on hearsay of what the defendant told
23 Mr. Anschutz. And I really think if there ever was a case
24 where it's -- a defendant's testimony where it's not something
25 that should be before the juror -- a juror in opening statement

1 when Mr. Stern mentioned it, there was an audible gasp. That's
2 something we ought to avoid in the case. It's supposed to be
3 tried on the facts, the facts of what is relevant to the
4 defendant's intent.

5 *THE COURT:* Mr. Richilano, what's your proffer of
6 Mr. Anschutz' testimony in that regard?

7 *MR. RICHILANO:* Your Honor, the circumstances of
8 Mr. Nacchio's older son's attempted suicide bears directly on
9 his state of mind in January and February of '01, which is --

10 *THE COURT:* Did this occur in '01?

11 *MR. RICHILANO:* It occurred in January of '01. And
12 Mr. Nacchio came to Mr. Anschutz, distraught, having learned of
13 his son's attempted suicide, and told him, I want to resign. I
14 can't be here to run this company.

15 Thereafter, the evidence, as the Court saw, there were
16 options offered. There was an effort to make Mr. Nacchio stay.
17 Mr. Nacchio wound up staying. The point is, at the time of his
18 son's attempted suicide, Mr. Nacchio was of the state of mind
19 that he didn't want any part of this, and that he could have
20 walked away with all of his vested options, and so the -- the
21 issue of a state of mind to cheat and to defraud pales in
22 significance to what was really going on in Mr. Nacchio's mind.
23 It's not going to be dwelled on with Mr. Anschutz.

24 *THE COURT:* I assume your submission is that
25 Mr. Anschutz' testimony is not hearsay, because it's offered

1 not to prove that the son was distressed, but that Mr. Nacchio
2 was concerned about the distress, and that was what on his
3 mind.

4 *MR. RICHILANO:* Correct.

5 *THE COURT:* All right. I'm going to allow it. The
6 jury will be instructed at the end of the case, as juries are
7 instructed in every case, that they're not to be governed by
8 sympathy or prejudice. There is not much more I can do. This
9 is a part of the story.

10 *MR. STRICKLIN:* We'll deal with it accordingly, Your
11 Honor.

12 *THE COURT:* And the jury needs to be told -- all
13 right. Let's get the jury.

14 *MR. STRICKLIN:* Can we have a five-minute break --

15 *THE COURT:* Wait a minute. They want a five-minute
16 break. I told them they could have a five-minute break.

17 (Recess from 9:36 a.m.)

18 (Jury in at 9:43 a.m.)

19 *THE COURT:* Mr. Richilano, you may call your first
20 witness.

21 *MR. RICHILANO:* Thank you, Your Honor. If the Court
22 please, the defense would call Philip F. Anschutz.

23 **(PHILIP ANSCHUTZ, DEFENDANT'S WITNESS, SWORN)**

24 *COURTROOM DEPUTY:* Please be seated.

25 Please state and spell your full name for the record?

1 fiber optics along railroad rights of way.

2 Q. And how far along had this company, SP -- was it SP Fiber
3 Optics?

4 A. SP Construction Company at the time, and then it changed
5 its name, as I recall, to Qwest.

6 Q. How far along was the project, the construction project,
7 when you were meeting with investment bankers in New York?

8 A. We had laid fiber and conduit along rights of way in a
9 variety of states. I don't recall how many. But what I do
10 recall is, I had spent, either invested or committed, firm
11 committed to spend about a billion dollars at that time in '96.

12 Q. Okay. And so then you went to New York, meeting with
13 investment bankers, and how did you come about to meet
14 Mr. Nacchio, then?

15 A. In the discussion with the investment banker, what I had
16 said to them is, you know, I have taken this about as far as I
17 know how to take it. And one of the alternatives is
18 considering taking it public. And one of the responses was,
19 you're going to need somebody to lead this company who is able
20 to do that. And Nacchio's name came up in that conversation.

21 Q. And so did you then seek out Mr. Nacchio?

22 A. The investment banker offered to set up a meeting, which he
23 did. And I saw Mr. Nacchio on the way out of the city,
24 returning to Denver.

25 Q. And how long was that initial meeting?

1 A. An hour, maybe two hours, I don't think it was any longer
2 than that.

3 Q. Were you interested in hiring Mr. Nacchio as the CEO of
4 this company?

5 A. I was interested to see if he was a candidate and what he
6 was like, yes.

7 Q. What were you looking for in a CEO?

8 A. I was looking for someone who had the background and the
9 experience and the knowledge in the industry and had read
10 about -- even though I never met Mr. Nacchio, had read about
11 and heard about him in the industry. He seemed to have the
12 skills and the background that would be very attractive to me.

13 Q. Did you then pursue discussions with him regarding
14 employment?

15 A. Before we did that, I think we talked about the company.
16 Mr. Nacchio asked me what exactly -- I think he had heard about
17 Qwest and had asked me about it, and I explained some things
18 about it. So that led into a discussion of the concept of what
19 it was that Qwest did.

20 Q. What was your vision, then, of -- you testified that you
21 told the investment banker you had taken the company as far as
22 you could take it. What was your vision for the CEO taking it
23 to the next level? What was in your mind?

24 A. Qwest needed to do several additional things. First of
25 all, it had a further commitment to build out its network and

Philip Anschutz - Direct

1 eventually to have a nationwide network, which at that point we
2 didn't have.

3 Secondly, to have actual customers. At the time, it
4 was primarily a construction company that laid fiber optics and
5 conduit and had very little customer base.

6 Q. Getting back to your discussions with Mr. Nacchio, did
7 there come a time when he signed a contract to become the CEO
8 for the company?

9 A. Yes. Our first meeting was, as I think I testified, in the
10 late fall of '96. After that, there were some -- several
11 back-and-forth conversations by telephone that I had with
12 Mr. Nacchio. And ultimately, he did come onboard. He did
13 accept the position. And he, I believe, started sometime in
14 early January of 1997.

15 Q. That was still before the company went public; is that
16 correct, sir?

17 A. That's correct.

18 Q. That occurred a few months later, in the summer of '97?

19 A. It occurred in mid 1997, and I believe it was in June, in
20 fact, of 1997.

21 Q. Now, was there a condition that Mr. Nacchio insisted on
22 with respect to his family, condition to his employment with
23 Qwest here in Denver?

24 A. The conditions -- the terms of the employment agreement
25 with Mr. Nacchio was, first, salary. As I recall, the salary

1 was in -- I believe 600,000 a year.

2 Secondly, that he would receive 3 percent of the
3 growth as growth shares over and above the investment that I
4 had made at the time, which as I said a moment ago was a
5 billion dollars of investment and commitments.

6 There was and had been considerable discussion, as
7 well, about his residence. At one point, as I recall, he
8 wanted the company to be headquartered in New Jersey. I
9 don't -- that was not acceptable and not agreed to.

10 Q. Okay.

11 A. But he was concerned about leaving New Jersey at the time.

12 Q. For what reason?

13 MR. STRICKLIN: I'll object, Your Honor. 1997, '96,
14 '97 is irrelevant time.

15 THE COURT: Sustained. I think I told you you could
16 get into some of this testimony later on, but not now,
17 Mr. Richilano.

18 BY MR. RICHILANO:

19 Q. How long was the contract for, Mr. Anschutz?

20 A. It was for five years.

21 Q. Starting the end of '96, for five years to that time?

22 A. For -- I think --

23 Q. The beginning of '96?

24 A. The start of January of '97, so whenever that five-year --

25 Q. Mr. Anschutz, I want to move forward to January, then, of

1 2001. What was the status of Mr. Nacchio's contract with the
2 company in January of 2001?

3 A. It expired at the end of 2001, at the end of December of
4 2001.

5 Q. Did something occur in January that affected the status of
6 Mr. Nacchio's contract?

7 A. Yes, it did.

8 Q. What happened, sir?

9 A. I received a phone call from Joe Nacchio. And he said, can
10 I come over for a private conversation with you?

11 Q. All right.

12 A. And --

13 Q. And did he?

14 A. He did.

15 Q. Describe what occurred.

16 A. He came to my office and closed the door. That was
17 quite -- I could tell he was agitated, by the way. And it
18 seemed he had -- he had never asked for a private meeting with
19 me, and he never -- we never closed the door. So clearly, I
20 was curious what was happening.

21 But Joe sat down and launched immediately into the
22 fact that his son had -- there had been a suicide attempt.

23 Q. And what else did he tell you in connection with that
24 event?

25 A. Well, he was quite agitated by it.

1 Q. Meaning, upset or emotional?

2 A. In fact, he broke down in tears. And so we then discussed
3 the incident, and he discussed his son, and we discussed some
4 possible solutions to the situation.

5 Q. How about his standing as CEO of the company, what did he
6 refer to there, if anything?

7 A. What was his standing, you say?

8 Q. What did he say to you in connection with his standing with
9 the company?

10 A. As a part of this conversation about his son, he then said,
11 "Phil, I want to resign." And I was -- first of all, I was
12 quite surprised at the news of his son, and was further
13 surprised by the fact that he would want to resign from the
14 company. And he wanted to resign then, too.

15 Q. Was there anything in his contract that kept him from
16 resigning?

17 A. No.

18 Q. Obviously, he could have resigned if he wanted to, right?

19 A. Absolutely.

20 Q. Are you aware of efforts thereafter by the comp committee,
21 the compensation committee of the Board of Directors to entice
22 him to stay?

23 A. Yes.

24 Q. But as of the time of this conversation with Mr. Nacchio,
25 he told you he wanted to resign; is that correct?

1 A. That's correct.

2 MR. RICHILANO: No further questions.

3 Thank you, sir.

4 **CROSS-EXAMINATION**

5 BY MR. STRICKLIN:

6 Q. Good morning, Mr. Anschutz.

7 A. Good morning, sir.

8 Q. Sir, you testified that you founded the company that Joe
9 Nacchio eventually ran; is that right?

10 A. That's right.

11 Q. And as such, when the company became public, you were
12 the -- by a large number, the largest shareholder of that
13 company; is that right?

14 A. That's correct.

15 Q. Approximately what percentage of the company, when the
16 company became public?

17 A. Up until before they went public, I owned 100 percent; and
18 after it went public, I believe that we offered 15 percent -- I
19 can't recall the exact amount, by the way, but that would be a
20 normal size for an IPO, which this was, being offered to the
21 public.

22 Q. And you -- when you were looking after that company, it was
23 important for you to have the right person in that position as
24 CEO of the company; is that correct, sir?

25 A. That's correct. And was one of the reasons why I selected

1 Mr. Nacchio.

2 Q. And one of the reasons you selected Mr. Nacchio was of his
3 years of experience at AT&T; is that true, sir?

4 A. Well, there were multiple reasons. I think I testified to
5 his background in the business. I like people that know the
6 business, that have come up in the business. And I especially
7 like people who have worked their way up in the business,
8 because they know -- you know, they know the companies and they
9 know the industry.

10 Q. And Mr. Nacchio -- I'm sorry, I didn't mean to interrupt
11 you.

12 A. If I could just -- the other thing about Mr. Nacchio is
13 that he had -- there is three major areas of AT&T, I believe.
14 One is their consumer business. One is their corporate
15 business, or -- with large businesses. And the third major
16 piece is their network, engineering and network, three major
17 pieces.

18 And the things that I especially liked about
19 Mr. Nacchio is that at one time or another, he had either run
20 or held senior positions in each of those three AT&T divisions.

21 Q. And so fair to say, then, that Mr. Nacchio knew you felt
22 that Mr. Nacchio knew the telecom business inside and out?

23 A. I certainly felt he did.

24 Q. And that held true for his time when he was CEO of Qwest;
25 is that true, sir?

1 A. As far as I know, yes, sir.

2 Q. And I think you testified that the way you originally got
3 in contact with Mr. Nacchio and learned of him was through
4 discussions with an analyst, Wall Street analyst; is that
5 right, sir?

6 A. Yes, his name was Mr. Grubman.

7 Q. Jack Grubman?

8 A. Jack Grubman.

9 Q. Isn't it true that Jack Grubman was at that time a leading
10 telecom analyst for Salomon Smith Barney?

11 A. He was, as I recall, one of the leading analysts in the
12 industry at the time. But he did work for Salomon Brothers;
13 that is correct.

14 Q. Now, one of the things that you -- you've mentioned some of
15 the experience Mr. Nacchio had. But one of the other things
16 that you liked about Mr. Nacchio was, according to a leading
17 telecom analyst, Mr. Nacchio had credibility with Wall Street?

18 A. Yes.

19 Q. And you testified about entering into a negotiation to try
20 to entice Mr. Nacchio to come and lead Qwest. Do you recall
21 that, sir?

22 A. Yes, I do.

23 Q. Okay. And you, in fact, negotiated with Mr. Nacchio on
24 several occasions dealing with his leading Qwest and the type
25 of package he was going to receive to lead Qwest.

1 A. The discussion in 1996, we talked really about four or five
2 key items. I did not that conduct the negotiation or the
3 contract details of that. I'm not sure if that was your
4 question --

5 Q. Well, I guess, to get to the point, you knew that
6 Mr. Nacchio was -- was a tough negotiator?

7 A. Yes.

8 Q. Very capable, right?

9 A. I would say that's -- I would say that's true.

10 Q. And he -- for the items that he negotiated, he certainly --
11 I mean, negotiation is give and take, but he certainly received
12 the benefits of his negotiation; is that right, sir?

13 A. Yes, he was good, and he was also bright, so --

14 Q. Now, at some point, Mr. Nacchio -- you were the -- back up.
15 You were the chairman of Qwest when Mr. Nacchio came on,
16 chairman of the board; is that right, sir?

17 A. That's correct.

18 Q. And at some point, you and Mr. Nacchio became co-chairmen
19 of the board of Qwest; is that right?

20 A. I was -- he was chairman and CEO, and I was non-executive
21 chairman of the board. Confusing, I might add. In fact, the
22 press has never understood it.

23 Q. Why don't you explain that to us now. What did that mean
24 you were the executive chairman of the board?

25 A. It's not executive; it's non-executive.

1 Q. I apologize.

2 A. Non-executive chairman of the board. And what that meant
3 was that I had no salary, and I had no incentives, and I had no
4 duties. It was really ceremonial. I was supposed to be -- the
5 right definition -- and others have defined it as that, I might
6 add.

7 And then Mr. Nacchio was chairman and CEO, meaning, he
8 was the chief executive officer and was responsible for running
9 the company.

10 Q. And that's what Mr. Nacchio did. You entrusted him to run
11 the company; is that right?

12 A. Well, I and the board entrusted Mr. Nacchio to run the
13 company, that's correct.

14 Q. And when it came to making decisions on behalf of the
15 company, Mr. Nacchio was the one who had the ultimate authority
16 to make those decisions on behalf of the company; is that
17 right, sir?

18 A. There were certain things that fall within the purview of
19 the board. But the board would look to Mr. Nacchio, as CEO,
20 for his recommendations.

21 Q. And, sir, were you on the audit committee of the Board of
22 Directors?

23 A. I was not.

24 MR. RICHILANO: Your Honor, we're now going way beyond
25 the scope. Direct examination was very limited.

1 *MR. STRICKLIN:* Your Honor, he asked about the
2 relationship of Mr. Anschutz to the defendant, and I'm trying
3 to understand the relationship that he had as his role in the
4 Board of Directors.

5 *THE COURT:* Overruled. You may proceed.

6 *BY MR. STRICKLIN:*

7 Q. Were you on the audit committee, sir?

8 A. I was not.

9 Q. But you were on the compensation committee; is that right?

10 A. I was on the compensation committee.

11 Q. Okay. And it was -- it was Mr. Nacchio's duty to perform
12 the inner workings of Qwest, when it came to the business plan,
13 for instance. That's Mr. Nacchio's responsibility, to have the
14 business plan of Qwest?

15 A. To have the business plan of Qwest? I don't --

16 Q. To formulate a business plan of Qwest, that was
17 Mr. Nacchio's responsibility?

18 A. To formulate a plan and a budget and present it to the
19 board, if that's -- I think your question.

20 Q. You actually got my next question right there. He was the
21 one who formulated the budget and presented that budget to the
22 board?

23 A. That's correct.

24 Q. And Mr. Nacchio was the one who set guidance to the street;
25 is that right, sir?

1 A. That's correct.

2 Q. And in fact, with regard to the guidance to the street, he
3 didn't run that by the board before he set the guidance, did
4 he?

5 MR. RICHILANO: Your Honor, again, beyond the scope.

6 THE COURT: Overruled.

7 THE WITNESS: What was your question?

8 BY MR. STRICKLIN:

9 Q. Mr. Nacchio didn't seek approval of the board before he set
10 the guidance to the street, did he?

11 A. Normally that would be within the authority of Mr. Nacchio.

12 Q. Were you aware, sir, that he raised his guidance to the
13 street on September the 7th of 2000?

14 A. I don't recall if I was at this time.

15 Q. Now, Mr. Nacchio did not run every major business decision
16 by you personally, did he?

17 A. He did not.

18 Q. And how often did you talk with Mr. Nacchio about the
19 business of Qwest? How often did you confer with Mr. Nacchio
20 during the time frame of 2000, 2001?

21 A. We would talk intermittently. Sometimes it would be
22 several times a month by meeting or sometimes it would be
23 several times a week. There was no schedule to it.

24 Q. Now, you testified that at the end of 2001 Mr. Nacchio's
25 contract was going to be up; is that right, sir?

1 A. That's correct.

2 Q. And you were -- it's true, sir, that you were in -- I
3 guess, both you and Mr. Nacchio knew the contract would be up
4 at the end of the year, correct?

5 A. That's correct.

6 Q. And there was -- I think in your words, there was kind of a
7 view towards that and a process of negotiation was going on
8 between you and the board and Mr. Nacchio?

9 MR. RICHILANO: I think that misstates the testimony,
10 Your Honor. I don't think he testified to that on -- at this
11 time frame.

12 THE COURT: Well, the witness can clarify to whatever
13 extent he wants to clarify.

14 THE WITNESS: I wasn't negotiating with Mr. Nacchio.
15 There was an ongoing discussion with the company and probably
16 with the compensation committee. So that part of your
17 question, I think, is correct.

18 BY MR. STRICKLIN:

19 Q. Just to be clear, though, you were definitely on the
20 compensation committee?

21 A. I was. And I believe Mr. Popoff was chairman of that
22 committee.

23 Q. And when you say there was ongoing negotiation with the
24 company, you're specifically referring to the Board of
25 Directors compensation committee?

1 A. Board of Directors compensation committee, that's correct.

2 Q. Okay. So -- all right.

3 Now, and that process was an ongoing process in 2001,
4 I believe, according to you?

5 A. Yes.

6 Q. All right. Now, at some point in 2001 -- and this is, you
7 know -- I know it's a sensitive matter, I could tell in your
8 voice, but sometime in 2001, sir, Mr. Nacchio approached you
9 about a very personal family matter; is that correct?

10 A. That's correct.

11 Q. And at that time, you said that Mr. Nacchio wanted to leave
12 the company because of this family situation; is that right,
13 sir?

14 A. That's correct.

15 Q. But Mr. Nacchio did not leave the company, did he?

16 A. He did not.

17 Q. And in fact, the board granted him 5 million options in
18 February of 2001?

19 A. As I recall, the compensation committee agreed in February
20 to extend an additional 5 million options to Mr. Nacchio.

21 Q. And at that time, the compensation committee also approved
22 a salary increase for Mr. Nacchio; is that true, sir?

23 A. I believe that's true.

24 Q. And at that time, the compensation committee also approved
25 a bonus percentage increase for Mr. Nacchio, sir?

1 A. And I believe that's correct.

2 Q. And Mr. Nacchio did not accept those options at some point
3 you learned; isn't that true, sir?

4 A. Yes.

5 Q. And in fact, in September of 2001, the board was able to --
6 September/October time frame of 2001, the board was able to
7 renegotiate a contract with Mr. Nacchio to ensure that he
8 stayed with the company?

9 MR. RICHILANO: Objection, Your Honor, this is, again,
10 well beyond the scope.

11 THE COURT: Overruled.

12 MR. RICHILANO: And misstating the evidence.

13 THE COURT: Well, if it's a misstatement, the witness
14 is perfectly capable of clarifying what his testimony is.

15 BY MR. STRICKLIN:

16 Q. Do you remember the question, sir?

17 A. I do. There was, I believe, a contract entered into with
18 Mr. Nacchio in that time frame, September, October of 2001, I
19 believe is what you said.

20 Q. And during that -- during that time period of 2001, would
21 you say that Mr. Nacchio was, in fact, going through the
22 process of renegotiating this contract?

23 A. I --

24 MR. RICHILANO: Objection to misstating the evidence,
25 Your Honor.

1 *THE COURT:* Overruled.

2 *THE WITNESS:* Apparently there was a negotiation going
3 on over some issues, and that's correct.

4 *BY MR. STRICKLIN:*

5 Q. And when you were speaking of issues, just to be clear,
6 we're talking about compensation?

7 A. Well, I think that's right in a general sense. But one of
8 the issues, for instance, is, as I recall the compensation
9 committee meeting back in February, they certainly wanted to
10 keep Mr. Nacchio as CEO, and the board of the company felt the
11 same.

12 And they had come up with a plan to incent Mr. Nacchio
13 to stay. But one of the ingredients of that plan,
14 Mr. Stricklin, was to back end load those options. What I mean
15 by back end load, they would vest at the tail end of that time
16 period, not on the front end, or not over the -- not over the
17 period equally. That was one of the issues.

18 The -- another issue was that his overall contract was
19 expiring at the end of 2001, December. So as I recall, those
20 were several of the issues the compensation committee was
21 following.

22 Q. And my question to you, sir, was the renegotiation of the
23 contract dealt with compensation of Mr. Nacchio; is that right,
24 sir?

25 A. Yes, that was one of the issues.

1 Q. And with regards to compensation of Mr. Nacchio, he had --
2 during the Board of Directors meetings, he presented evidence
3 to the Board of Directors as far as where he felt his
4 compensation should be; is that true, sir?

5 A. You're saying, did he present to the Board of Directors
6 where he felt the compensation level should be?

7 Q. That's right.

8 A. You know, that may have happened, Mr. Stricklin, but I
9 don't recall it. I don't recall him presenting to the Board of
10 Directors.

11 Q. Do you recall him having an attorney represent him in
12 matters dealing with compensation to the board, making
13 presentations that his salary should be increased? When I say
14 his salary, I mean his compensation, whether it's salary, stock
15 options.

16 A. To the Board of Directors, again?

17 Q. Compensation committee, sir.

18 A. So we're talking about the board or the compensation
19 committee now?

20 Q. Well, let's start with the board.

21 A. Well, as I previously testified, I don't recall Mr. Nacchio
22 or his attorney presenting to the Board of Directors.

23 Q. Do you recall a firm hired by him presenting to the Board
24 of Directors?

25 A. Well, honestly, I don't. It's possible, I suppose, but I

1 don't recall that at this time.

2 Q. What about -- what about to the compensation committee?

3 A. I think that is -- that is correct. Mr. Nacchio --
4 possibly somebody representing him could have made a
5 presentation on Mr. Nacchio's behalf about compensation.

6 Q. And this was all happening in the February -- well, from
7 February on until his contract was finally agreed upon; is that
8 true, sir?

9 A. Generally in that time frame, yes.

10 Q. And do you recall with specificity and specifically, do you
11 recall how much time after Mr. Nacchio came and spoke with you
12 about the very difficult family situation, do you recall how
13 much time he took off work?

14 A. No. What I had encouraged him to do at that January
15 meeting -- and we didn't spend any time talking about
16 compensation or even him staying with Qwest. We talked about
17 his son. But sometime after that, and I'm guessing a matter of
18 a couple of weeks, he seemed to be improved state of mind, I
19 would say. And I believe -- this is my belief --

20 Q. Well, I -- that's inappropriate for you to give your
21 belief. If it's a fact, I have no objection to you testifying.
22 If it's something you believe --

23 MR. RICHILANO: Depends on foundation.

24 MR. STRICKLIN: Excuse me, Mr. Richilano.

25 Your Honor --

1 MR. RICHILANO: I'm objecting --

2 MR. STRICKLIN: Nonresponsive.

3 MR. RICHILANO: I'm objecting to the witness not being
4 allowed to complete his answer.

5 THE COURT: Well, he can't express his personal
6 belief, that is correct. If he wishes to state what he recalls
7 of the facts, he can do so.

8 THE WITNESS: Your Honor, you say I can or cannot?

9 THE COURT: You cannot express your personal belief.
10 You can recall the facts.

11 BY MR. STRICKLIN:

12 Q. My question was, it was really very simple, was, do you
13 recall exactly how much time Mr. Nacchio took off? And that's
14 the question.

15 A. It was a matter of some days, a couple of weeks. I mean, I
16 don't recall.

17 Q. Okay. Now, at -- at some point, you felt it necessary to
18 go a different direction with the company and fire Mr. Nacchio;
19 is that true?

20 MR. RICHILANO: Your Honor, I object. This is beyond
21 the scope. It's improper questioning. I object.

22 MR. STRICKLIN: Your Honor --

23 MR. RICHILANO: I ask the question be stricken.

24 MR. STRICKLIN: Your Honor, if I could be heard. This
25 witness has extensively talked about how he hired him, how he

1 supported the defendant through this time, and I have a right
2 to explore that was not always the case. They --

3 *MR. RICHILANO:* Your Honor --

4 *THE COURT:* This was, I take it, much later than the
5 period charged?

6 *MR. RICHILANO:* Yes, Your Honor.

7 *MR. STRICKLIN:* And they talked about hiring him in
8 '97 --

9 *THE COURT:* Objection sustained.

10 *MR. STRICKLIN:* May I approach on one matter. I won't
11 want to argue with the Court's ruling, but there is a matter.

12 (Hearing at the bench.)

13 *MR. STRICKLIN:* This issue goes simply to bias. And
14 during the negotiation of the termination agreement, the
15 parties had arranged a non-disparaging clause in the contract,
16 and it might go to explain why -- for the jury's mind why this
17 witness is here.

18 *THE COURT:* What did it provide?

19 *MR. STRICKLIN:* It provided that for a three-year
20 period, non-disparaging clause, it agreed they would not talk
21 bad about each other for a three-year period, Your Honor. And
22 I think that should be before the jury.

23 *THE COURT:* Mr. Richilano, your response.

24 *MR. RICHILANO:* The termination agreement took place
25 well beyond the time of this period, number one. The

1 three-year period is now up. Number thee, the Court does not
2 have before it the agreement to make the ruling.

3 *THE COURT:* All right. Well, get the agreement before
4 me.

5 All right.

6 *MR. RICHILANO:* This is in the context of the
7 termination itself, which he's trying to get in through the
8 back door, which the Court said he could not.

9 *THE COURT:* I disagree. I think that the Government
10 is entitled on cross-examination to attempt to establish bias.
11 I don't think it needs to get into the date of the agreement or
12 the substance of the agreement or anything other than the
13 clause in the agreement by which they parted.

14 I thought that he was going the same direction you
15 thought he was going, that is to say, that things weren't going
16 so well in 2002, that line of questioning.

17 I didn't allow that question, Mr. Richilano. And I
18 will instruct the jury at the end of the case that questions
19 are not comments. And for your side of the case to cast
20 aspersions on the way questions are asked is the pot calling
21 the kettle black, very clearly.

22 And so you may ask the question as to whether in
23 the -- in the agreement concerning termination of the
24 employment there is this clause. And you may inquire about the
25 clause.

1 MR. STRICKLIN: Your Honor, this man sitting right
2 here is in lawsuits and has been in lawsuits with the
3 defendant. He -- Mr. Mohebbi has testified that he is in
4 lawsuits. If I had called the witness, it would be a mistrial.

5 This man is vouching for how great a guy Joe Nacchio
6 is and how in 1996 that he was an outstanding performer. I
7 think this jury has a right to hear that changed. And the
8 reason that changed is because he lacked credibility in the
9 street and because of the lawsuits that have been filed with
10 this defendant.

11 THE COURT: Well, there is a distinction here. What
12 happened after 2002 to cause this witness to change his opinion
13 of Mr. Nacchio is not relevant, because -- for the same reason
14 that I've excluded a lot of other evidence, beyond the relevant
15 time period.

16 However, I've already said you can establish bias or
17 attempt to establish bias in this way. That's the Court's
18 ruling.

19 So the -- I don't know whether there is a question or
20 not.

21 MR. RICHILANO: There isn't. But I have not been
22 given notice of this agreement. I want a copy of it so I can
23 redirect my witness in the event there are details of this
24 thing that need to be brought out.

25 THE COURT: Are you saying that you've never seen a

1 copy of this?

2 *MR. RICHILANO:* Of course, I've seen it. But I don't
3 have it available to --

4 *THE COURT:* Well, give him a copy, if that's the
5 issue.

6 *MR. STRICKLIN:* He can have this one.

7 *THE COURT:* Obviously, you should have a copy. Of
8 course.

9 (Hearing continued in open court.)

10 *THE COURT:* I don't think there is a question pending,
11 so you may proceed, Mr. Stricklin.

12 *BY MR. STRICKLIN:*

13 *Q.* Mr. Anschutz, there came a time when you and the company
14 and Mr. Nacchio reached a mutual agreement; is that true, sir?

15 *A.* That's correct.

16 *Q.* And in that agreement, there was a specific clause
17 negotiated by the parties called a non-disparaging clause; is
18 that right?

19 *A.* First of all, I didn't negotiate the agreement, but this --
20 for the record. And I don't recall there was a clause
21 specifically in the agreement that Mr. Nacchio had with the
22 company.

23 But if there was one, it wouldn't surprise me, because
24 it is a normal clause to have in.

25 *MR. STRICKLIN:* May I approach, Your Honor?

1 *THE COURT:* Yes.

2 *BY MR. STRICKLIN:*

3 *Q.* Do you recognize this as the agreement that I'm referring
4 to?

5 *A.* I do not.

6 *Q.* Okay. Would you like to look through it and see if you
7 recognize this agreement?

8 *A.* I don't believe I've seen this agreement before,
9 Mr. Stricklin.

10 *Q.* Are you aware of the term --

11 Your Honor, it's the word -- I'm cautious to use the
12 word --

13 *THE COURT:* Why don't you refer him to the paragraph
14 that we went through at the bench and ask if he's aware of the
15 general terms.

16 *MR. RICHILANO:* Your Honor, he already testified
17 twice, he does not recognize this agreement.

18 *THE COURT:* If that's an objection, it's overruled.

19 *BY MR. STRICKLIN:*

20 *Q.* Paragraph 7, "No public comment, no disparagement." Do you
21 recognize that, sir?

22 *A.* I see the words here, Mr. Stricklin.

23 *Q.* And do you remember having an agreement where you had
24 agreed not to disparage Mr. Nacchio in public?

25 *A.* I believe this agreement is between the company and

1 Mr. Nacchio. Is that not correct?

2 Q. If that's your belief --

3 A. I don't see where -- in this contract any --

4 Q. You were --

5 A. I was a member of the board, I suppose.

6 Q. Well, in 2002, were you the chairman of the board?

7 A. I was non-executive chairman of the board.

8 Q. Non-executive chairman. And this agreement would apply to
9 you; is that right, sir?

10 A. Yes.

11 Q. And you knew not to say bad things about Mr. Nacchio in the
12 public; is that true?

13 A. Under the terms of this agreement, I think that's correct.

14 Q. And Mr. Nacchio in turn, as part of the agreement, would
15 not say bad things in public about you?

16 A. Under the terms of this agreement, I believe that to be
17 correct.

18 *MR. STRICKLIN:* Pass the witness, Your Honor.

19 *THE COURT:* Mr. Richilano, is there redirect?

20 *MR. RICHILANO:* Yes, sir.

21 **REDIRECT EXAMINATION**

22 *BY MR. RICHILANO:*

23 Q. Mr. Anschutz, to the extent that you recall this
24 document -- and I think your testimony was you didn't recall
25 it -- these non-disparagement agreements or provisions are

1 typical in contracts such as this; is that your experience?

2 A. It is.

3 Q. Does that agreement or does that provision say that you can
4 come into court and not tell the truth?

5 A. It does not.

6 Q. And in fact, you're obliged to come in and tell the truth,
7 aren't you?

8 A. I am.

9 Q. And nothing in this document says that you can't, right?

10 A. That's correct.

11 *MR. RICHILANO:* Nothing further.

12 *THE COURT:* All right. Is this witness to be excused?

13 *MR. RICHILANO:* We have no objection.

14 *MR. STRICKLIN:* Yes, Your Honor.

15 *THE COURT:* All right, sir. You're excused from
16 further appearance and discharged from any subpoena.

17 *THE WITNESS:* Thank you, Your Honor.

18 *THE COURT:* Call your next witness.

19 *MR. SPEISER:* Abbot Giles.

20 **(ABBOT GILES PETER HAYES, DEFENDANT'S WITNESS, SWORN)**

21 *COURTROOM DEPUTY:* Please be seated.

22 Please state and spell your full name for the record.

23 *THE WITNESS:* My formal name is Right Reverend Abbot,
24 A-B-B-O-T, Giles Peter Hayes, G-I-L-E-S, H-A-Y-E-S.

25 **DIRECT EXAMINATION**

1 BY MR. SPEISER:

2 Q. Abbot Giles, would you tell us what your profession is.

3 A. I'm a benedictine monk, and a Roman Catholic priest, and my
4 particular responsibility now, although I have a few, my
5 leading responsibility is as abbot of St. Mary's Abbey in
6 Morristown, New Jersey.

7 Q. And what does an abbot do, if you can explain that?

8 A. An abbot is a prelate in the Roman Catholic church. He's
9 an ordinary, which means like a bishop, he is in charge of the
10 authority for the monks in his community and the works that
11 they do, schools, parishes, et cetera.

12 Q. Are you the equivalent of a bishop?

13 A. Yes, over my monks, I am, but I cannot ordain priests, only
14 bishops can do that.

15 Q. And do you also have another part of your profession?

16 A. Yes.

17 Q. What is that?

18 A. Well, I teach and counsel in the school that our abbey runs
19 called Delbarton School. And I have done college counseling
20 there. And I have been very active in community service and
21 social action throughout the area.

22 Q. Have you had administrative positions at the Delbarton
23 School?

24 A. Yes.

25 Q. What are they?

1 A. I was assistant head barton in the 1970 -- early 1970s. I
2 have been a college counselor and a counselor every year since
3 the early '70s. I was headmaster of the school. We have
4 five-year terms from 1980 to 1985, and then again headmaster
5 from 1996 until 1999.

6 Q. Presently, are you still affiliated with the school?

7 A. Yes.

8 Q. When did you have occasion to meet the Nacchio family?

9 A. I met the Nacchio family in September 1993 when Anne and
10 Joe's oldest son, David, joined our school in the seventh
11 grade.

12 Q. Now, later on, were there any problems with David at the
13 school?

14 *MR. STRICKLIN:* Objection, Your Honor. Relevance.

15 *MR. SPEISER:* Your Honor, I'm trying to get the
16 background as to the relationship of the family and what
17 happened.

18 *THE COURT:* Objection sustained.

19 *BY MR. SPEISER:*

20 Q. When Mr. Nacchio obtained the position -- was considering
21 the position as CEO of Qwest, did he have any conversations
22 with you?

23 A. Yes, sir.

24 Q. Would you tell us about them, please?

25 A. Yes.

1 MR. STRICKLIN: Objection to relevance, Your Honor.

2 THE COURT: Sustained. This is prior to the time
3 period in question.

4 BY MR. SPEISER:

5 Q. Moving forward to the period of December 2000.

6 A. Yes, sir.

7 Q. Did you and Mr. Nacchio take a trip at that time?

8 A. Yes, we did.

9 Q. Do you recall when that was?

10 A. From December the 15th until December the 20th.

11 Q. And where did you go?

12 A. We went to Magoffin County in eastern Kentucky.

13 MR. STRICKLIN: I'll object at this time to relevance.

14 MR. SPEISER: May I be heard?

15 THE COURT: That objection is overruled.

16 BY MR. SPEISER:

17 Q. And what was the purpose of the trip?

18 A. We have a mission, if you will, down in eastern Kentucky,
19 and this particular trip in December is done to give gifts and
20 food to the poor. It was taken by approximately 35 or 40
21 students, including Joe's second son, Michael, and
22 approximately ten to a dozen parents who wanted to be with
23 their sons, including Joe.

24 Q. And what did you do in Kentucky?

25 A. Well, we rose at about 6 o'clock, quarter to 6:00, and we

1 worked straight through until 8 or 9 o'clock at night out in
2 the --

3 *MR. STRICKLIN:* I'll object to the details of
4 relevance.

5 *THE COURT:* Sustained.

6 *MR. SPEISER:* Your Honor, may I be heard? This is a
7 question of access that Mr. Nacchio had to the outside world,
8 which was a question regarding testimony of other witnesses.

9 *THE COURT:* You may ask him that question, then, and
10 no other questions.

11 *BY MR. SPEISER:*

12 *Q.* Was there cell telephone service where you were located?

13 *A.* In the year 2000, it was very, very bad. My cell phone did
14 not work, and most of the other men's cell phones did not work.

15 Now my --

16 *Q.* We're talking about then --

17 *A.* No.

18 *Q.* -- in the year -- December of 2000.

19 *A.* No.

20 *Q.* Okay. Did you learn in mid -- approximately mid
21 January 2001 of the problem with David Nacchio?

22 *A.* Yes, I did.

23 *MR. STRICKLIN:* Your Honor, I'll object to relevance
24 and hearsay.

25 *MR. SPEISER:* The relevance will be that he then

1 discussed it with Mr. Nacchio and will go to Mr. Nacchio's
2 state of mind.

3 *MR. STRICKLIN:* That --

4 *THE COURT:* I'll allow it. And the jury is instructed
5 that this simply goes to Mr. Nacchio's state of mind during the
6 relevant time period in 2001.

7 *THE WITNESS:* Yes, sir, I -- I learned that David, who
8 at that time was in college, attempted suicide.

9 *BY MR. SPEISER:*

10 Q. Did -- I'm sorry, did you --

11 A. Attempted suicide.

12 Q. Did you have meetings with Mr. Nacchio thereafter?

13 A. Yes, many.

14 Q. What did you discuss?

15 A. A number of school things. But on a number of occasions,
16 he reflected to me how frustrated he was, how he was having a
17 very hard time, and he asked, as he had earlier, if -- he
18 thought that I -- I thought he was saying he was going to quit
19 Qwest, and he felt the need to be home closer to Anne.

20 Q. What did you say to him?

21 A. I recommended then and at other times that he not quit
22 Qwest, that he keep on with his career, that the school would
23 take care of the boys, and would support Anne.

24 *MR. SPEISER:* Thank you. I have no further questions.

25 *THE COURT:* Cross-examination, Mr. Stricklin.

1 A. He made one large donation, sir.

2 Q. How large was that?

3 A. In the vicinity of a million dollars.

4 Q. And in addition to that, when his children attended school
5 there, they paid your regular tuition of around \$20,000 a year?

6 A. In those days, it was somewhat less.

7 Q. How much --

8 A. Yes.

9 Q. How much less than 20,000?

10 A. Probably 15- or \$16,000, yes.

11 Q. And that's just the tuition cost?

12 A. That's everything.

13 Q. Room and board?

14 A. No, we don't have -- this is not a boarding school; this is
15 a day school.

16 Q. All right. And, sir, you -- you testified that you took a
17 trip with Mr. -- back up.

18 Tell us when the donation was to Delbarton School.

19 A. I first asked Joe and Anne for a donation in 1999. The
20 donation probably came in early -- the yes probably came right
21 around that time, 1999, and the donation came in over a period
22 of time. In other words, there would be, I think -- I'm not
23 absolutely sure of this, perhaps I should have looked it up
24 before I came. But I believe the gift was given in three
25 parts.

1 Q. Beginning in 2001, sir?

2 A. My recollection would be that probably would be in earlier
3 than that.

4 Q. And -- in the year 2000?

5 A. I would say early in the year 2000. After we made the
6 request, it didn't take them long to say yes.

7 Q. And the -- you say it came in three parts. The last part,
8 did that come in the year 2001?

9 A. That -- the large donation came -- let me be clear on this.

10 Q. Yes, sir.

11 A. The gift -- the large gift was a pledge. And pledges are
12 honored over a period of time. And the Nacchios are still
13 honoring their pledge as we speak in '06. So the exact dates
14 when that pledge began, I would say late '99, early '02, and
15 then the money was just given over a period of time.

16 Q. When you said late '99, early '02 --

17 A. I'm sorry, early 2000, I'm sorry.

18 Q. Okay. And this trip -- this trip that you made to
19 Appalachia -- Kentucky; is that right?

20 A. Yes, sir.

21 Q. I think you were talking about his availability. You
22 stayed at a hotel there, right? A motel, I should say?

23 A. We stayed at a -- yes, it's fair to say it's a motel, but
24 it wouldn't be the sort of motel that you and your wife and
25 children would stay at.

1 Q. Well, you don't know the type of motels me and my wife and
2 my children would stay at?

3 A. I know. I'm sorry. Yes, we stayed in a very, very old
4 broken down motel.

5 Q. Okay. They have -- as much -- Kentucky, they have phones
6 there, correct?

7 A. Yes, they do. May I respond?

8 Q. Sure.

9 A. The -- in this particular motel, the phones in the rooms
10 either didn't work at that time or were -- weren't intended to
11 work. You could call from room to room, but I could never call
12 out. And I've been staying in that motel since 1980.

13 Q. You could have --

14 A. I called out when I would go downstairs to the office, as I
15 would have occasion to do, because of my work back at the
16 school, to find out how things were going.

17 I asked Mr. Nacchio, telling him how serious the phone
18 situation was, if he, as a telephone person, could get me a
19 satellite phone, because we frequently found ourselves in areas
20 in the hollers where there was no phone service, no phone
21 service at all for cellular phones. And in certain area of the
22 county, there isn't even -- wasn't then electricity.

23 So Joe did give me for that five- or six-day period a
24 satellite phone.

25 Q. And in fact, Mr. Nacchio brought two satellite phones with

1 him on that trip?

2 A. I did not know that.

3 Q. But you're aware that he brought at least one satellite
4 phone?

5 A. That I had, yes.

6 Q. And were you aware that he told his people that he wanted
7 to make sure he was staying in contact with them at Qwest?

8 *MR. SPEISER:* Objection, Your Honor.

9 *THE COURT:* The basis for your objection?

10 *MR. SPEISER:* He's asking the witness what Mr. Nacchio
11 told other people.

12 *THE COURT:* He's asking whether the witness is aware
13 of that, and the objection is overruled.

14 *THE WITNESS:* I'm not -- I was not aware of that, that
15 Mr. Nacchio told his people he was going to stay in touch with
16 them.

17 *BY MR. STRICKLIN:*

18 Q. Were you aware that he had explained exactly where he was
19 going to be so that it would be within two hours of an airport,
20 that if need be, the corporate jet could come in and remove him
21 from the area?

22 A. I wasn't aware that he made that comment, but it's --
23 the -- two -- being two hours away from the nearest airport is
24 correct.

25 Q. Charleston on one side and Louisville on the other?

1 A. No, Lexington on the other.

2 Q. Lexington, I apologize.

3 And how long have you been going on this trip?

4 A. Since 1980.

5 Q. And this was the first time Mr. Nacchio joined you?

6 A. That's correct.

7 Q. And on this trip with you, you realized -- do you know that
8 a professional photographer came at Mr. Nacchio's request to
9 photograph some of this?

10 A. Yes.

11 Q. And this ended up being used as publicity for Qwest; is
12 that right?

13 A. I never saw that publicity, but I suppose it could have
14 been used.

15 Q. Do you know that Mr. Nacchio talked about this with the
16 *Wall Street Journal*?

17 A. I did not know that, sir.

18 Q. I'll move on.

19 Sir, in your church, you've had the opportunity to
20 counsel many people, including Mr. Nacchio; is that right?

21 A. That's correct.

22 Q. And in that regard, you've dealt with some people with some
23 very serious problems?

24 A. That's correct.

25 Q. And, sir, you know in your line of work that people are

1 under all kinds of pressures in their life.

2 A. Of course.

3 Q. And it's something we all share; is that right?

4 A. That's correct.

5 Q. And you've also learned in your work, sir, isn't it true,
6 that good people can do bad things?

7 MR. SPEISER: Your Honor, this is really out of line.

8 THE COURT: Sustained.

9 MR. STRICKLIN: I'll have nothing further, Your Honor.

10 THE COURT: I take it the objection is that it's
11 argumentative.

12 MR. SPEISER: Yes, Your Honor.

13 THE COURT: All right. Do you have redirect?

14 MR. SPEISER: No, Your Honor.

15 THE COURT: All right. Sir, you may step down.

16 You're excused from further appearance in the case.

17 Who is your next witness?

18 MR. SPEISER: Daniel Fischel.

19 THE COURT: All right. Members of jury, I need to
20 make some legal rulings at this time.

21 Unfortunately, I'm just going to have you remain in
22 your jury room while that happens.

23 So I'll ask you to retire to your jury room.

24 (Jury out at 10:49 a.m.)

25 THE COURT: The Court will take up at this time the

1 motion of the Government, document No. 334, to exclude the
2 testimony of proposed defense witness, Professor Daniel
3 Fischel.

4 The Government has filed a 63-page motion. The Court
5 has read the motion. The Court has read Mr. Richilano's letter
6 purporting to outline the Rule 16 information required of a
7 proponent of expert testimony. And the Court has also received
8 and reviewed the brief reply filed by Mr. Nacchio.

9 To summarize, the Government charges that the defense
10 expert disclosure does not comply with the federal Rules of
11 Criminal Procedure. It argues that the testimony is
12 inadmissible under Rule 602, 403, 702, and 703 of the federal
13 Rules of Evidence. The Government argues that this -- the
14 testimony consists of a recitation of facts not within the
15 witness' personal knowledge. The Government argues that the
16 testimony is not necessary and will not help the jury. It
17 argues that Mr. Fischel is not a qualified expert. It argues
18 that the defense has not established that the witness used a
19 reliable methodology in reaching his opinions. And it argues
20 that the facts upon which Fischel relied in making his opinion
21 are not the ones upon which a reasonable expert would rely.

22 In the Court's view, the deficiencies under *Daubert*
23 and *Kumho Tire* in these disclosures are so egregious that they
24 hardly warrant the 63 pages of ink the Government has spilled
25 in opposing the testimony. The testimony is excludable on a

1 number of rationales.

2 Most convincingly, the defendant has made no attempt
3 to comply with Rule 702 or *Daubert* and establish that Fischel's
4 testimony is the product of reliable principles and methods or
5 that Fischel applied some principles and methods reliably in
6 this case.

7 Rule 702 governs this issue. It provides that if
8 specialized knowledge will assist the trier of fact to
9 understand the evidence or to determine a fact in issue, a
10 witness qualified as an expert may testify in the form of
11 opinions if the testimony is based on sufficient facts or data;
12 two, the testimony is the product of reliable principles and
13 methods; and, three, the witness has applied the principles and
14 methods reliably in this case.

15 The leading cases in this area, which Rule 702 was
16 amended to reflect, require that when the factual basis, data,
17 principles, methods or application of an expert's testimony are
18 called into question, the trial judge must determine whether
19 the testimony has a reliable basis in the knowledge and
20 experience of the relevant discipline.

21 *Daubert* itself involved scientific testimony. As is
22 relevant here, the Court in *Kumho Tire* expanded the *Daubert*
23 analysis to include expert analysis based on technical or other
24 specialized knowledge.

25 The *Kumho* court held that the test of flexibility is

1 flexible and *Daubert's* list of factors neither necessarily nor
2 exclusively applies for all experts or in every case.

3 The importance of an expert's methodology in arriving
4 at a opinion is long and well established in the law. As the
5 Supreme Court noted in *Daubert*, the inquiry is a flexible one.
6 The focus, of course, must be solely on principles and
7 methodologies, not on the conclusions they generate.

8 Pursuant to Tenth Circuit case law, any step that
9 renders the analysis unreliable renders the expert's testimony
10 inadmissible.

11 The defendant's only representation on this issue is
12 that, and I quote, "Professor Fischel has completed extensive
13 review of SEC filings, press releases and other financial data
14 and applied his academic study and professional experience in
15 economics and the public market to formulate opinions."

16 The Court finds this to be woefully inadequate to
17 satisfy Rule 702. Indeed, as the advisory committee notes
18 state, if the expert witness is relying solely on experience,
19 then the witness must explain how that experience led to the
20 conclusion reached, why the experience is a sufficient basis
21 for the opinion, and how that experience is reliably applied to
22 the facts in this case.

23 Simply put, nothing in *Daubert* or the Federal Rules of
24 Evidence requires a district court to admit opinion testimony
25 that is connected to existing data only by the ipse dixit of

1 the expert, and that is precisely what we have here.

2 The Court is concerned not only with the methodology,
3 which is absolutely undisclosed in this expert disclosure, the
4 Court is concerned that the Rule 702 stipulation that the
5 testimony must be helpful to the jury is not met here.

6 First, many aspects of the testimony are simply
7 nothing more than closing argument meant to rebut a suggestion
8 in a government closing argument or to buttress or repeat or
9 foreshadow an argument in the defense closing argument.

10 For example, he is -- he has alleged -- it is alleged
11 that he is going to testify that the defendant did not have an
12 incentive to trade on the basis of inside information.

13 All that factual material is before the Court as to
14 whether he did or did not have an incentive to trade on inside
15 information. For example, with respect to the growth shares,
16 there has been examination on that. Argument can be made one
17 way or another by the attorneys. And the jury does not need to
18 have an expert opinion to assist it in deciding whether there
19 was an economic incentive to trade or not trade on inside
20 information here.

21 Another example is that the proposed expert is
22 supposed to be testifying on the fact that the defendant's
23 sales did not increase during the relevant period of time.
24 Whether he has an opinion as to whether they increased is
25 neither here nor there. It's essentially irrelevant.

1 The Government has presented a summary testimony
2 tending to show, if believed, that the sales and the rate of
3 sales and the rate of money made increased in the first six
4 months of 2001. The defendant has already cross-examined on
5 that issue and brought out facts from which the jury could
6 believe that the prosecution's summary is essentially a spin.

7 If the defense wants to do a similar summary and spin
8 it differently, the defense may do so. It may not spin it
9 differently by offering the testimony of an expert who purports
10 to offer an opinion or a conclusion that the jury can draw from
11 other evidence in the case.

12 The Court is also concerned that this would not be
13 helpful to the jury because a lot of what this man is proposed
14 to testify to is within the common knowledge of the jury and
15 can be -- is a conclusion that the jury can draw based on
16 argument and the evidence in the case.

17 For example, the expert is proposed to testify that
18 Mr. Nacchio's investments were consistent with the economics of
19 diversification.

20 Well, now, that's a piece of elucidation we really
21 don't need here. The issue about diversification in this case,
22 the prosecution claims that he was already diversified, and
23 they presented evidence to that effect. The defendant contends
24 with substantial support from Mr. Weinstein that he was not
25 diversified, and that he was being constantly advised to

1 diversify further.

2 The jury simply doesn't need this so-called expert
3 witness to testify that diversification is an issue in this
4 case. It is a subject which is properly the subject matter of
5 argument by counsel.

6 A large portion of this testimony is simply
7 irrelevant.

8 For example, the expert proposed -- proposes to point
9 out that at the same time Mr. Nacchio was selling other people
10 within Qwest were selling also. And also he's going to point
11 out, evidently, that Michael Eisner was selling his Disney
12 stock and Mr. Dell was selling his stock in Dell at the same
13 time. It's so wide afield that it's almost preposterous he
14 would be testifying about Michael Eisner or Dell.

15 As to the fact that other directors were selling in
16 the meantime, the Court is puzzled as to how that can be
17 relevant in this case. If other directors were selling -- and
18 many of the insiders have been prosecuted, or at least some of
19 the -- insiders have been prosecuted -- that's neither here nor
20 there as to whether this defendant is guilty of willfully and
21 in bad faith selling on inside information.

22 Finally, the Court is concerned that this is not
23 helpful to the jury and should be excluded under Rule 403.

24 It would be a needless presentation of evidence. It
25 would lead to delay and waste of time. It would mislead the

1 jury, in the Court's view.

2 As I've reiterated, the bulk of these conclusions are
3 conclusions which the jury can draw after hearing the arguments
4 back and forth. They don't need an expert witness. And what
5 the Court is apprehensive about is that the defense will be, in
6 effect, inviting the jurors to abandon their own common sense
7 and common experience and succumb to this expert's credentials.

8 Finally, the Court is persuaded by the argument that
9 the bulk of this testimony is simply a recitation of facts
10 which is improper under Rule 602.

11 Specifically, the defense says that Professor Fischel
12 will testify that, A, Qwest's stock price declined when it
13 announced its September 2000 guidance. That's a fact. If the
14 defendant wants to establish the fact, it can do so.

15 He will testify most analysts did not change their
16 recommendations, targets or forecasts after the 2000 guidance
17 was issued. If that's the fact, the defendant can call
18 witnesses and establish that fact. It doesn't need this
19 testimony.

20 He will testify analysts did not adopt Qwest's
21 guidance as their forecasts and instead relied on their own
22 forecasts.

23 He will testify, according to the defense, analyst
24 reports showed their understanding that economic conditions
25 would cause Qwest's financial performance to be worse than

1 expected.

2 He will testify, according to defense, Qwest's stock
3 price did not decline significantly in September 2001 when it
4 reduced the guidance.

5 And he will testify finally, just like Qwest, other
6 telecommunications companies reaffirmed their guidance between
7 September 2000 and May 2001 and reduced their guidance after
8 May 2001.

9 All of those are facts. This witness has no direct
10 personal knowledge of all of those facts. It's perfectly
11 obvious. And the defense can establish those facts by
12 competent evidence if it wishes to do so.

13 For all of those reasons, primarily the gross defect
14 in failing to reveal the methodology, the motion to exclude the
15 testimony of Daniel Fischel is granted.

16 Who is your next witness?

17 *MR. SPEISER:* Your Honor, may I be heard?

18 *THE COURT:* No. You know, in this court, we follow
19 the rule, generally, that we have argument and ruling. Not,
20 the Court rules, and then it's an interactive process where you
21 get to argue later on. I have your motion, I have the
22 Government's motion, I have your response. Any argument that
23 you wish to make could have been put in the response.

24 *MR. SPEISER:* We were under tremendous time pressure.

25 *THE COURT:* So what? You could have put it in the

1 response. You have made your record. You have made your
2 argument. I've ruled. This habit that the defense has of
3 questioning every ruling by argument later on is not going to
4 be tolerated in this court.

5 Mr. Stern, I'm not -- sit down. I don't need to hear
6 from you now, please.

7 MR. STERN: It's not on this subject.

8 THE COURT: Does the defense have any other witnesses?

9 MR. STERN: May I respond to you?

10 THE COURT: To that question, yes.

11 MR. STERN: As I understand Your Honor's ruling, we
12 can still call Dean Fischel for summarization charts. I
13 believe --

14 THE COURT: You could. If you've got summarization
15 charts and you want to use him essentially as the Government
16 used its summary witness, you can do that.

17 MR. STERN: That's the reason I stood up, not to
18 violate any rule of this Court.

19 Now, we're going to need a few minutes, in light of
20 Your Honor's ruling, to discuss this with Dean Fischel. May we
21 have that?

22 THE COURT: The jury is waiting.

23 MR. STERN: Yes, I understand, but the defendant, it
24 seems to me, should be given some period of time --

25 THE COURT: Are you telling me you haven't prepared

1 these charts?

2 *MR. STERN:* I am telling -- not my witness. But you
3 told Mr. Speiser to sit down, and you're yelling at us, so I'm
4 trying my best to not offend the Court but represent a client.

5 *THE COURT:* Look, don't engage in this gratuitous
6 self-effacing approach to things. Just answer my question.

7 *MR. STERN:* I need to speak to the witness for a few
8 minutes. May I have a brief recess?

9 *THE COURT:* Well -- and my question to you, are you
10 telling me he's prepared charts that he can use to summarize
11 this or not?

12 *MR. STERN:* Mr. Speiser --

13 *MR. SPEISER:* Yes, however we will need a short time
14 to organize it.

15 *THE COURT:* Why?

16 *MR. SPEISER:* Because it was worked in the way that
17 dealt with various opinion testimony. I'm requesting, you
18 know, the Court give us a short recess to, you know, organize
19 our presentation.

20 *THE COURT:* Don't you have any other witnesses?

21 *MR. SPEISER:* No.

22 *MR. STERN:* Just a minute.

23 Your Honor, if you don't want to give us a recess,
24 it's --

25 *THE COURT:* Look, I want to use the jury's time. As I

1 have told you continuously throughout this trial, when the jury
2 is here in the jury room, I want to do my best to see that
3 they're not twiddling their thumbs in there.

4 *MR. STERN:* Your Honor, I speak to you respectfully
5 and in a moderate tone. I would appreciate it if you would
6 stop shouting at me.

7 *THE COURT:* Mr. Stern, do you want to answer my
8 question, or do you want to sit there and make speeches?

9 *MR. STERN:* I'm standing, and I'm not making a speech.

10 *THE COURT:* Sit down.

11 Mr. Traskos.

12 *MR. TRASKOS:* I have a request, if they were to call
13 Mr. Fischel as a Rule 1006 witness with charts, we would have a
14 chance to examine the underlying data. I'm not sure we're
15 going to be able to do that in a matter of a few minutes.

16 *THE COURT:* This should have been prepared a long time
17 ago. This couldn't have been a surprise to a lot of lawyers
18 that I might rule this way. This is not a close question as
19 far as I'm concerned. Maybe if you find a need to take it up
20 to an appellate court, who knows what an appellate court would
21 do. But as far as I'm concerned, this is not a close question.
22 You should have been prepared. Now we're in a position where
23 the jury is twiddling its thumbs because you haven't prepared
24 the summary exhibits, and you need to look at the underlying --
25 the Government has to look at the underlying documents.

1 *MR. SPEISER:* I believe we sent them all the
2 documents.

3 *MR. TRASKOS:* Your Honor, we received last night about
4 8 o'clock a number of charts, but without any underlying data,
5 including things like the Michael Eisners and the other things,
6 and it's this binder here that we printed out last night, so we
7 have not had a fair opportunity --

8 *THE COURT:* Are those the charts that -- in the
9 binder?

10 *MR. TRASKOS:* These are a number of -- this is a set
11 of charts, public statements of Mr. Nacchio and various other
12 things. I'm not sure which ones they're proposing to offer.
13 They're clearly based on underlying data of some sort.

14 *THE COURT:* So you're going to need more time, if --
15 at the -- depending on -- where are the charts? Show me the
16 charts, first of all.

17 *MR. TRASKOS:* Do you want --

18 *THE COURT:* Who has got the charts?

19 *MR. TRASKOS:* I've got the binder of the
20 demonstratives they sent last night.

21 *MR. SPEISER:* May I approach?

22 I believe it's tabs 2 through 6, if I could have a
23 moment to look through.

24 *MR. TRASKOS:* I'm sorry, which tabs?

25 *MR. SPEISER:* 2 through 6.

1 *THE COURT:* 2 through 6, he said.

2 *MR. SPEISER:* If I can have a moment, there may be
3 some other charts we wish to --

4 I believe 9, 10 and 11.

5 *THE COURT:* Well, to characterize 2 through 6 as a
6 chart stretches the word "chart" beyond any common English
7 meaning.

8 *MR. SPEISER:* I would skip 2. I didn't mean 2, Your
9 Honor. 3, 4, 5, 6.

10 *THE COURT:* Well, the comment applies to them too.
11 They're not charts. And what's the next exhibit? Did you say
12 9, sir?

13 *MR. SPEISER:* Yes, 8, 9, 10.

14 3 through 10 would be the exhibits we wish to put in
15 through the witness.

16 *THE COURT:* All right. And those were disclosed to
17 the Government last night?

18 *MR. TRASKOS:* Yes.

19 *THE COURT:* That's the first disclosure. And it is
20 the Government's representation that there has been no
21 disclosure of the underlying data.

22 *MR. TRASKOS:* That's correct.

23 *MR. SPEISER:* The charts --

24 *MR. TRASKOS:* There are references, I see, of
25 documents, but this is what we received.

1 *THE COURT:* The charts themselves --

2 *MR. SPEISER:* The charts themselves refer to what
3 documents they're based on.

4 *MR. TRASKOS:* It seems for some of them. I'm looking
5 at 9 right now. There is a reference to -- this is what --
6 what you have, I assume -- I'm not looking at the same thing,
7 but I assume you have the same thing that I received last
8 night.

9 *MR. SPEISER:* Your Honor, just for the record, we
10 received their charts from the witness yesterday,
11 Ms. Chamberlin, we received it the night before.

12 *MR. HEARTY:* Your Honor, just to clarify that, that
13 was those two line charts that were based on the defense
14 exhibit that went out the night before. That -- that was the
15 outliners on those two charts, just demonstrated for
16 demonstrative purposes, and they were simply a result --
17 graphical depiction of the defense exhibit.

18 *THE COURT:* But the remaining charts had been
19 furnished before, according to the Government?

20 *MR. HEARTY:* That's correct.

21 *THE COURT:* And so what is it -- you don't -- you
22 don't know whether these are admissible or you want to discuss
23 them with the witness? What do you want?

24 *MR. SPEISER:* I just would like 15 minutes to be able
25 to sit down with the witness and organize the testimony in

1 light of Your Honor's ruling.

2 *THE COURT:* And then you're going to request time
3 because they -- is all of the underlying material in evidence?

4 *MR. TRASKOS:* I don't know. I have not gone through
5 all of the materials -- I didn't frankly have time, Your Honor,
6 to go through and match up the -- I wasn't focused on whichever
7 ones there focusing. I was trying to get through all 31 of
8 them. I don't know. Some of them may be, some of them may not
9 be. I'd certainly like a chance to take a look at it, see if
10 it's accurate, if it's wrong, cross-examine the witness about
11 it.

12 *THE COURT:* Well, that seems fair. So why don't we
13 just tell the jury to take a week off? You know, are you going
14 to have your case together? It's now your turn, and I expect
15 you to present a coherent organized case and to keep the thing
16 going.

17 *MR. STRICKLIN:* Your Honor, I heard Mr. Stern say that
18 they had no further witness aside from Mr. Fischel, and I just
19 want to confirm that. Alternative would be able to call
20 another witness.

21 *THE COURT:* That's what I was asking earlier, is
22 whether there was another witness.

23 *MR. SPEISER:* There is not another witness.

24 *MR. STERN:* Excuse me, I didn't respond, and he knows,
25 he just represented to you. This morning he asked you for five

1 or ten minutes, it was granted. I didn't oppose it. We've
2 asked you a simple request. You've made an important request
3 concerning a key witness. We would like to meet with him so we
4 can organize the testimony.

5 *THE COURT:* It was a ruling that any reasonable
6 defense attorney would have anticipated.

7 *MR. STERN:* Well, I did not anticipate it.

8 *THE COURT:* If this was not a surprise to you, you
9 could knock me over with a feather.

10 *MR. STERN:* I have no intention of knocking you over.
11 But I did not anticipate the ruling, and I have made a
12 request. It is quite customary in litigation --

13 *THE COURT:* It is not customary.

14 *MR. STERN:* 15 minutes.

15 *THE COURT:* You have 15 minutes.

16 *MR. STERN:* Thank you.

17 (Recess from 11:14 a.m. until 11:30 a.m.)

18 *THE COURT:* Mr. Speiser, what do you want to do?

19 *MR. SPEISER:* I want to proceed with Mr. Fischel.

20 *THE COURT:* All right. So we should get the jury?

21 *MR. SPEISER:* Yes.

22 *THE COURT:* Mr. Traskos.

23 *MR. TRASKOS:* I reviewed these exhibits to see whether
24 I could tell what they were underlying, and the honest answer
25 is I can't. They refer to things like "brokerage statements."

1 They don't say what brokerage statement it is. I don't know
2 whether they're in evidence. Frankly, some of these are
3 actually going back to '97 or '98. Chances are, we may not
4 even have some of these statements to begin with. There is a
5 reference from --

6 I'm sorry, but I would like an opportunity to look at
7 the underlying data, see if it's right, see if there is any
8 basis for cross-examination, see if the calculations are right
9 or whether they're misleading in any way.

10 I'd like a chance to examine all of that. Right now
11 I'm not sure I could go back and reconstruct this. It says SEC
12 Form 4, that's a type of document.

13 *THE COURT:* That's consistent with this man's
14 testimony. It's sort of like trying to nail jello to the wall.
15 You just don't know what it is.

16 The rule provides, as follows: The underlying
17 documents, that is the originals, shall be made available for
18 inspection or copying or both at a reasonable time and place.
19 The Court may order that they be produced in court.

20 Is it the Government's request that I order they be
21 produced in court?

22 *MR. TRASKOS:* I think that's the easiest way to
23 proceed.

24 *THE COURT:* Do you have a problem with that?

25 *MR. SPEISER:* No, Your Honor.

1 *THE COURT:* So ordered.

2 Have they been produced?

3 *MR. SPEISER:* I believe most of the documents that he
4 relied on the Government had placed into evidence yesterday.
5 They placed, I believe, brokerage statements, Form 4s of the
6 defendant. That's what this is mostly based on.

7 *MR. TRASKOS:* Some of that may be true. I'm pretty
8 sure that a lot of that is not true, given how far back this
9 goes into 1997 and '98 and '99. It's true -- I'm sure that
10 some of the documents on which this is based are in evidence,
11 but I'm sure based on what I've seen that there is a
12 substantial amount of this that is not in evidence.

13 *THE COURT:* Mr. Speiser, is it your representation as
14 an officer of this court that all of the documents on which
15 these materials are based have been introduced into evidence?

16 *MR. SPEISER:* I cannot make that representation doing
17 a -- without doing a thorough analysis. It's my
18 understanding -- I mean, this is not based on as many documents
19 as he seems to claim, based on defendant's trading records from
20 '98, '99, 2000, his witness testified to all of this yesterday.

21 *THE COURT:* His witness testified to things that were
22 in evidence -- when you say "his witness," I think you're
23 talking about Hearty's witness, testified to things in
24 evidence.

25 *MR. HEARTY:* It was a combination. To be clear, the

1 trading records that are prior to the time frame in question,
2 some of his sales back -- you know, going back into the 1998,
3 2000 time period, those were identified in the summary exhibit
4 by Bates number, but not all of those were admitted into
5 evidence.

6 The trading information that was in the 2001 time
7 period, those underlying documents were all admitted into
8 evidence.

9 But I will also tell the Court that based on our
10 Exhibit 410, for the prior records, at least the ones that we
11 relied on in there, we did have business record certifications
12 and produced those to the defense in advance of trial.

13 *THE COURT:* Are you drawing a distinction between the
14 two exhibits that were introduced at the end and Exhibit 410?

15 *MR. HEARTY:* No, the only distinction that I'm drawing
16 is, as far as -- 1006 requires the records be admissible, not
17 admitted, and so the records that support the trades in the
18 charged time period, 2001, those underlying records are
19 admitted into evidence.

20 The records that were for the trades prior time
21 period, we did not move those into evidence.

22 *THE COURT:* Because they weren't relevant.

23 *MR. HEARTY:* That's correct.

24 *MR. SPEISER:* However, the witness testified about
25 them and --

1 *THE COURT:* I understand that. There is no
2 requirement that they be admissible, only that they may be made
3 available, and the obvious purpose is so that the opposing
4 party can check. You can't offer these exhibits without
5 telling the party -- your opponent what the exhibits are based
6 on, what the underlying documents are.

7 *MR. TRASKOS:* Your Honor --

8 *MR. SPEISER:* The underlying documents are the SEC
9 filings and brokerage statements. They have been available to
10 the prosecution for quite a long period of time. We served
11 them with our documents and our exhibits weeks ago, and they're
12 in there.

13 *THE COURT:* Well --

14 *MR. SPEISER:* This should not come as a surprise to
15 them. Mr. Stern opened on it.

16 *THE COURT:* It's one thing to say, we have furnished
17 the documents and told them what documents we're relying on.
18 It's another thing to say, we gave them a truckload of
19 documents, and there is some that are in there.

20 *MR. SPEISER:* Well, I don't think we gave them a
21 truckload, Your Honor. These are -- you know, this is not
22 something they know nothing about. It's simply the defendant's
23 trading records from '98, '99, 2000, 2001, which have been gone
24 through -- brought up various times in this trial. Mr. Stern
25 opened on it. He used charts similar to the one the witness

1 will identify. I don't see how they can claim surprise when
2 they don't know what this is based on. It's not something
3 mysterious. These are records of his trades for four years.
4 That's what we're testifying about.

5 *MR. TRASKOS:* Your Honor, have a suggestion, I don't
6 know if it would work, to make the best use of the jury's time.

7 And I don't know whether there are other witnesses
8 after this witness that they would intend to call, but one
9 possibility would be that Mr. Fischel could testify on direct
10 examination but we could suspend the cross -- if he is, indeed,
11 the last witness, we could do the cross-examination on Monday.
12 I would then have the weekend to examine the.

13 *THE COURT:* But the charts presumably are going to
14 come in. The problem is that we need to determine the accuracy
15 of the charts and whether they are supported in documentation.

16 And the parties can dispute accuracy, I understand
17 that. But the underlying documentation has to be produced so
18 that the parties have the factual premise for that kind of a
19 dispute.

20 You know, I think we just need to proceed, and if they
21 can't establish that these have been -- these exhibits have
22 been produced and that the underlying data has been produced
23 with respect to each chart, the objection to the admissibility
24 of the charts will need to be sustained.

25 I mean, it's your burden, Mr. Speiser.

1 MR. SPEISER: I understand, Your Honor.

2 THE COURT: All right. Are we ready for the jury?

3 The other suggestion -- I'm perfectly willing to, of
4 course, allow the defense to go out of order in its
5 presentation of witnesses and postpone this entire issue until
6 the parties can have an opportunity to discuss it.

7 MR. STRICKLIN: That --

8 THE COURT: But so far there is -- I'll ask you,
9 Mr. Speiser, since you're over there where no other defense
10 attorney can get to you for a little while.

11 Are you -- do you have other witnesses?

12 MR. SPEISER: None today, Your Honor.

13 THE COURT: What does that mean?

14 MR. SPEISER: I would have to defer to Mr. Stern. I
15 am just working with this witness.

16 THE COURT: All right, Mr. Stern, the ball has been
17 handed off to you. You may answer the question of whether you
18 have other witnesses that you can call.

19 MR. STERN: We do not have any other witness we can
20 call today.

21 THE COURT: Well, you know, this isn't going to be a
22 case where we adjourn so that you fellows can think about your
23 case. You've had months and months to think about your case
24 and to think about the basic decision that you know that you
25 have to make in this case.

1 MR. STERN: I understand that. I think Mr. Richilano
2 told you yesterday that we would be able to tell you that by
3 Monday. And in any event, as important as the jury's time is,
4 and it is a treasure that has to be carefully nurtured, there
5 are other rights and needs as well.

6 Now, we could not anticipate, no matter what you may
7 think, Your Honor, we could not anticipate your rulings before
8 you gave them. The charts that, as I understand, Dean Fischel
9 wants to used are based on the same summary information their
10 summary witness used as she summarized trading going back to
11 '98 and made comparisons between the tradings in that period of
12 time and the charged period of time.

13 I must respectfully point out to the Court that I
14 believe the prosecution in this case is not giving you a full
15 account. They have had the records, all the records that have
16 being relied on for many months, if not years. They have had
17 full notice of what our position is, because I opened to the
18 jury using virtually identically the charts that our expert is
19 going to use.

20 This effort to indicate to you that they are being
21 prejudiced is flat out wrong. The only one who would be
22 prejudiced by our inability to produce evidence in this room is
23 the man accused of the crime, and we're attempting to
24 demonstrate to you and to the jury that it is not true.

25 THE COURT: All right. Now, argument is done, folks,

1 we're going to get the jury, and then the witness can testify,
2 and we'll just limp along as best we can. But I -- you know,
3 jury's been out now for well over an hour while we've dithered.

4 *MR. RICHILANO:* Your Honor, can I say one thing,
5 please.

6 *THE COURT:* No. What do you need to say,
7 Mr. Richilano?

8 *MR. RICHILANO:* Your Honor, we anticipate no other
9 witnesses, but we have video evidence that is admissible under
10 902(11) and we intend to play it, but if the Court requires us
11 to have a live witness, we need to have a witness on Monday.

12 *THE COURT:* You can play it, if that helps. You know,
13 all I'm saying is, can we use the jury's time, hear other
14 evidence and postpone all of these kids in the sandbox issues
15 that you guys have with this. And by that I mean, this is --
16 these underlying questions ought to be worked out between
17 counsel.

18 Mr. Speiser ought to be able to tell you -- to show
19 you specifically the documents that this witness used, and the
20 Government ought to have those documents, and it ought to have
21 them in time to make -- to form a conclusion as to whether the
22 documents support the summary. And you all ought to work that
23 out outside of court. That's not time that we need to take for
24 the court and jury.

25 So if you have other evidence, I suggest we proceed

1 with that other evidence, and if it's the playing of a
2 videotape -- how long will it take?

3 *MR. RICHILANO:* There are several clips.

4 *MS. GILLIGAN:* Maybe half hour, maybe an hour.

5 *MR. STRICKLIN:* Just to be clear, it's my
6 understanding we have received no notice of which clips they
7 want to play.

8 *THE COURT:* Are they clips that are already in
9 evidence, Mr. Richilano?

10 *MR. RICHILANO:* By and large, or as to which there are
11 certifications.

12 *MS. GILLIGAN:* Either they're in evidence or there are
13 certifications.

14 *THE COURT:* That shouldn't be a problem.

15 *MR. STRICKLIN:* The problem is we've been required to
16 show demonstratives ahead of time. The Court in chambers
17 required us to give certain notice to defense of which clips we
18 intend to play. We've done that. Now all of a sudden they're
19 trying to dump clips on us. The purpose for that is the rule
20 of completeness.

21 *MR. RICHILANO:* They can do it in their rebuttal of
22 the case if the Court allows it. We're doing the same thing
23 that they did on their case.

24 *MR. STRICKLIN:* Except for we gave them notice, that's
25 the difference, and that's all I --

1 *THE COURT:* I understand. You know, both sides play
2 by the same rules, and so if notice was given -- and I don't
3 think I've tried to enforce private agreements among counsel.

4 *MR. STRICKLIN:* You ordered me in your -- in your
5 chambers about that order --

6 *THE COURT:* Is that right? I didn't recall that.
7 Okay.

8 Well, let's try to proceed with the video clips, and
9 then the parties should confer and see if you can straighten
10 out this question of the underlying exhibits or documents.

11 Okay.

12 Who wants to play the video clips?

13 *MS. GILLIGAN:* I do, Your Honor.

14 *THE COURT:* Well, I'm glad you're bright-eyed and
15 bushy-tailed about that.

16 *MS. GILLIGAN:* May I approach?

17 *THE COURT:* Yes.

18 All right. So can we get the jury at this time, or
19 does anybody else have something that they just absolutely need
20 to say?

21 *MR. STRICKLIN:* You know -- I mean, this is -- it's
22 ridiculous, the lack of notice is ridiculous. We can't -- I
23 have no idea what these videotapes say. I have no idea what
24 parts of these they're going to cull from this and dump on the
25 jury.

1 *THE COURT:* What do you propose, Mr. Stricklin? We
2 just send the jury home, or tell them --

3 *MR. STRICKLIN:* Tell them that the defense didn't give
4 notice, and you send them home, which you would do to us if we
5 weren't ready. We've been ready every single day. 5 minutes
6 to 5:00, we called witnesses in here. All we're asking is for
7 the witness rules to be enforced.

8 *MR. STERN:* We can proceed with Dean Fischel, I think
9 probably there will be a lunch recess, they can recheck all the
10 exhibits they've already had for years, because they subpoenaed
11 all the man's trading records for years that they've been
12 investigating them. It's the same underlying records that
13 their own summary witness from the FBI testified to, and their
14 own office, yesterday from charts that they selected the
15 material to use was the sworn testimony.

16 *THE COURT:* If we argue long enough --

17 *MR. STERN:* We'll be in the lunch hour.

18 I'm sorry, I felt the need to respond to my adversary.

19 *THE COURT:* And I wouldn't want to interfere with your
20 need to response.

21 *MR. STERN:* I understand that.

22 *THE COURT:* I guess we should take the lunch. Maybe
23 that's the best way to deal with it at this point.

24 Mr. Stricklin, the alternative is, as you say, to send
25 the jury home.

1 MR. STRICKLIN: Actually, I don't think that is the
2 alternative. I think in -- I'll just be very candid with the
3 Court. In every case, in every trial, there comes a decision
4 whether the defendant is going to take the stand or not. And
5 it has to be made -- that decision has to be made in the course
6 of trial, in the course of the defendant's case.

7 They're wanting the weekend to make that decision.
8 They've had months, if not years, as Mr. Stern has reminded us,
9 about this. And I think that they ought to be required to make
10 that decision now, over lunch break, and decide if they're
11 going to put him on, put him on this afternoon.

12 MR. RICHILANO: Your Honor, at the bench yesterday, I
13 informed the Court of the limitations and the limits of our
14 case, to convenience the Court and to give notice to counsel.
15 Our case is not going to be weeks; our case is going to be a
16 day and a half. And I said, working backwards, you know, we
17 needed the weekend to make that one decision. I think the
18 Court was fine with that. We are way ahead of schedule, and I
19 don't think the jury is inconvenienced by having to go to
20 Monday on that decision, or to finish our case.

21 THE COURT: Why don't we just send them home right now
22 on all of this and let you guys work and get this together.
23 That would solve your problem, would it not, Mr. Stricklin?

24 MR. STRICKLIN: Yes, sir, with one key aspect. I ask
25 that the Court set a deadline for them to decide whether or not

1 they're going to call the defendant. Here is my concern --
2 here is my concern. You appropriately remind -- reminded me
3 yesterday at bench that we've had plenty of time to prepare for
4 a cross-examination if one were to occur, and that much is
5 true.

6 My concern is, they're going to wait and wait and wait
7 until the end and then rest without calling the defendant, and
8 then have to move right into closing arguments and play a game
9 of gotcha. We have been giving them witnesses, sometimes as
10 many of seven at a time, in advance of 48 hours to let them
11 know exactly when our case was going to close and rest, and
12 we'd ask the same in return.

13 *MR. RICHILANO:* Your Honor, we don't have the burden
14 here. We've told the Court what our position is.

15 *THE COURT:* All right.

16 *MR. STERN:* I suggest that we take our lunch. The
17 videos are all on exhibits that they've had for years. The
18 man, Fischel's --

19 *THE COURT:* I'm sorry, Mr. Stern.

20 *MR. STERN:* I'll sit.

21 *THE COURT:* You're repeating what you've already said.
22 What I've decided is -- as you've all noted, we're way ahead of
23 time. This trial is going to be completed easily within
24 probably half the time that it was -- was allotted to it.

25 I regret having to send the jury home, but I think

1 that's the best solution in all of these circumstances.

2 It solves most of the Government's problem of getting
3 notice, and I'm telling you, Mr. Speiser, you get them the
4 documents that your expert is relying on. If it's necessary,
5 you sit down with some of the Government attorneys or agents,
6 and you go through those documents that he's going to rely on
7 in his summaries.

8 *MR. SPEISER:* We're prepared to do that, Your Honor.

9 *THE COURT:* All right. You do that.

10 With respect to the defendant testifying, I assume you
11 have a cellular telephone, Mr. Stricklin.

12 *MR. STRICKLIN:* I do, Your Honor.

13 *THE COURT:* By 5:00 p.m. Saturday afternoon, somebody
14 on the defense side is going to call and tell you whether the
15 defendant will testify in this case. Do you have any problem
16 with that?

17 *MR. STERN:* Yes, I do.

18 *THE COURT:* What?

19 *MR. STERN:* I don't think I'm required to do that.

20 *THE COURT:* Well, you're required at some point,
21 Mr. Stricklin -- Mr. Stern. You're beginning to both look
22 alike to me.

23 *MR. STERN:* I would be very happy if that occurred,
24 but the fact of the matter is, I -- Your Honor, I don't believe
25 under the Fifth and Sixth Amendments I should be required to do

1 that, nor do I think the Court should set an arbitrary or any
2 kind of time limit upon which that right has to be exercised.
3 I ask you to think about it --

4 *THE COURT:* Well, the rule has been 48 hours for every
5 witness.

6 *MR. STERN:* We will -- they have had my assurance that
7 they will have 48 hours' notice in advance of any witness.
8 That's all I'm required to do. I'm not required to tell them
9 who isn't going to testify, and I will keep -- and the rule was
10 a private agreement, and I am going to keep my word. But I ask
11 the Court to think about a court order requiring me to make a
12 statement on a certain time in that area.

13 *THE COURT:* Wait a minute, wait a minute. You've
14 said -- if he's going to testify on Monday sometime --

15 *MR. STERN:* Then I'll give them the required notice.
16 But that's my agreement with them. It's another thing to say
17 that I have to tell them by then what my final election will
18 be. I have other witnesses I want to call.

19 *THE COURT:* Look. I don't think it's any burden at
20 all upon his constitutional rights in this case for you to make
21 a decision at some point. At some point, you're going to have
22 to make a decision.

23 *MR. STERN:* That is correct.

24 *THE COURT:* The question is whether you get to make
25 the decision without any notice to the Government.

1 MR. STERN: That is also --

2 THE COURT: That is not going to happen. You will
3 give them notice of whether he's going to testify. I'm not
4 burdening you or the defendant at all. You've had literally
5 the entire period of time of this case. I know whether he
6 testifies depends on things that happened in the case. Most of
7 those things have already happened. That decision can be made,
8 and it will be made. And you will communicate that to him
9 on -- by 5 o'clock on Sunday evening -- Saturday evening. I
10 don't think that -- if you give me authority that that's wrong,
11 I'm happy to reconsider, Mr. Stern. But --

12 MR. STERN: I'll -- you know, I haven't got a law
13 library in my pocket, and I can't anticipate issues that are
14 going to arise. All I can do is give you my best judgment that
15 requiring a defendant to give notice as to his testimony or not
16 as to his election or his declination impinging upon his rights
17 of the Fifth and Sixth Amendment.

18 THE COURT: How does it impinge --

19 MR. STERN: That's his decision to make it whenever he
20 wishes, provided that decision doesn't, you know, in some way
21 substantial disaccommodate the Court.

22 I don't believe that the considerations of the
23 convenience of the prosecution are a legitimate concern of the
24 defendant in terms of making the decision or what time to make
25 it.

1 Now, I can only tell you my best estimate of what I
2 believe the law is at this time. If you wish it, we will, of
3 course, take a look at the press deputies. But I -- I tell
4 you, frankly, as I stand before you, I couldn't imagine that
5 this would arise, and I'm unable to do it.

6 *THE COURT:* Well, you made an agreement with
7 Mr. Stricklin that -- you haven't denied that you're already
8 going to do it.

9 *MR. STERN:* I have said to this Court that I will live
10 up to my word with Mr. Stricklin. Your Honor's proposed order
11 is different, and it is --

12 *THE COURT:* How is it different? It's better for you
13 than what you've already agreed.

14 *MR. STERN:* Don't do me any help and take back the
15 order.

16 *MR. STRICKLIN:* Under the supervisory powers of this
17 Court, you have the authority to do that. Under Rule 611, you
18 have the authority to do that. It is not a burden on the
19 defendant.

20 *THE COURT:* I agree. So the order stands.

21 *MR. STERN:* One final thing, when you send the jury
22 home, I take it you're not going to blame the defense and say
23 we're not ready to proceed.

24 *THE COURT:* Right.

25 *MR. STERN:* I can't hear you.

1 *THE COURT:* Right. I'll just send the jury home.

2 *MR. WISE:* Your Honor, one issue before we adjourn.

3 If I can inquire of the defense through the Court, is there any
4 intention to put on classified information either through the
5 defense or any other witness? Agency counsel can't get here
6 because of the Easter break on an instant's notice. I was
7 talking to them this morning from the SCIF. If there is no
8 intention, they don't come; if there is, as many as eight
9 people will have to come, and that will also trigger as many as
10 a dozen potential rebuttal witnesses given the scope of the
11 proffers, all of whom are out of town and have busy schedules.

12 *THE COURT:* Not to mention the court security officer.

13 *MR. WISE:* And the court security officer.

14 *THE COURT:* Mr. Stern, can you elucidate?

15 *MR. STERN:* Yes. Although -- I am doing this
16 voluntarily, not because I think I have to, because I think
17 under our 48-hour agreement, 48 hours is 48 hours. And Monday
18 is a good piece further than 48 hours from now.

19 Nonetheless, as a courtesy to the people involved and
20 as a courtesy to the Court, I say to you in light of certain
21 rulings that Your Honor has made, particularly, I can't go into
22 them, but I will file a piece of paper in an appropriate way in
23 the SCIF, which would have limited our ability to explain why
24 we did not get certain contracts and would have limited our
25 ability to cross-examine certain of their witnesses. I cannot

1 be more specific, but I will supplement the record in an
2 appropriate way. We will not adduce classified -- we will not
3 use the material that he's worried about or call the witnesses
4 that he's worried about.

5 *MR. WISE:* If I could just ask a follow-up. They need
6 to be here even if the underlying material are discussed --

7 *MR. STERN:* That's all --

8 *MR. WISE:* If government contracts line comes up, they
9 need to be here, because if there are inadvertent disclosures,
10 there may be -- they need to be here for that. So I --

11 *MR. STERN:* That's tied up with the decision about the
12 defendant testifying. I'm very sorry for them, but they'll
13 have to be here if they think they should be. I'm not prepared
14 to make a final decision in that area right now. I've done the
15 best that I can.

16 *THE COURT:* All right. Well, what I suggest you do is
17 trot in all of the agency witnesses. I will trot in the court
18 security officer. I think that's the only thing we can do.

19 *MR. STERN:* That is not correct. I will -- they will
20 know by Saturday night whether there is any need for that.
21 Now, if you want to trot people around, of course, it will not
22 be my fault. I cannot at this time answer his questions nor
23 should I have any pressure put upon me to do it. You've
24 ordered Saturday night, they'll know it Saturday night, and
25 then they can do whatever they want --

1 *MR. WISE:* I don't think they can get here with that
2 tight of time.

3 *MR. STERN:* We will be sure that there is no such
4 material used -- how much notice do you need?

5 *MR. WISE:* They need to be able to get on a plane.

6 *MR. STERN:* How much notice do you need?

7 *MR. WISE:* However much time is -- I'm not a travel
8 agent.

9 *MR. STERN:* What are you asking for?

10 *MR. WISE:* A commitment, I guess.

11 *THE COURT:* I'm not here to referee this. You'll have
12 to work out a commitment that is satisfactory to you in the
13 form of counsel's word.

14 *MR. WISE:* Thank you, Your Honor.

15 *THE COURT:* All right. Let's get the jury.

16 (Jury in at 11:58 a.m.)

17 Members of the jury, I have some good news and some
18 bad news.

19 The good news is that this trial will be over in all
20 likelihood much earlier than any of us had anticipated. I
21 think I told you when you were being selected that you should
22 plan for a seven-and-a-half-week to eight-week trial. That
23 does not look like it's going to happen. The trial will be
24 over, in all likelihood, sometime next week and at the -- at
25 the outside, the following week.

1 That's the good news.

2 The bad news is it won't be over today. So what I'm
3 going to do, allow you to go home so we can do some things
4 ourselves that don't require your waiting around in the jury
5 room. So you will -- as you know, we're in recess Friday
6 anyway, and over the weekend, obviously. So you'll have the
7 afternoon off in addition to Friday.

8 And I will ask that you come back ready to go at a
9 quarter of 9:00, 8:45 a.m., on Monday. Is that April 9?
10 April 9. Monday, April 9 at 8:45.

11 I remind you, once again, remember not to discuss the
12 case with anyone during this lengthy recess, including your
13 family, anybody that you run into socially or anyone else. If
14 anyone attempts to talk to you, please call me or let me clerk
15 know immediately.

16 Do not follow or read any publicity, radio publicity,
17 television publicity, other newspaper publicity. Do not speak
18 to any party, attorney or witness. Keep an open mind. Go
19 home. Have a pleasant weekend. Do not even think about the
20 case.

21 You're excused at this time.

22 (Jury out at 12:02 p.m.)

23 All right. I anticipate that counsel will work these
24 matters out so that we're ready to proceed with the jury at
25 8:45, or if there is nothing further, the defense can rest at

1 8:45 Monday, if that's what you want to do, and the case can
2 progress expeditiously.

3 MR. STERN: Thank you, Your Honor.

4 THE COURT: Court will be in recess.

5 (Recess at 12:03 p.m.)

6 **INDEX**

7

8 **Item** **Page**

9 WITNESSES

10	PHILIP ANSCHUTZ	
	Direct Examination By Mr. Richilano	2388
11	Cross-examination By Mr. Stricklin	2395
	Redirect Examination By Mr. Richilano	2414
12	ABBOT GILES PETER HAYES	
	Direct Examination By Mr. Speiser	2416
13	Cross-examination By Mr. Stricklin	2421

14 REPORTER'S CERTIFICATE

15

16 I certify that the foregoing is a correct transcript from
17 the record of proceedings in the above-entitled matter.

18 Dated at Denver, Colorado, this 5th day of April, 2007.

19

20

Therese Lindblom, CSR, RMR, CRR

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